Petition

81-971

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

No.

WYNN OIL COMPANY,

Petitioner

v.

SOUTHERN UNION EXPLORATION COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO AND THE COURT OF APPEALS OF NEW MEXICO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Fourteenth Amendment guarantees of notice, opportunity to be heard, and even-handed treatment protect a civil defendant from the affirmance by a state appellate court of a substantial money judgment against it, after the appellate court has reversed the finding of fact on which the trial court judgment rests, on a theory of which it had no notice, that the plaintiff's own trial pleadings and proofs contradicted, that the trial court did not find and was not asked to find, and that relies on implicit fact findings made contrary to the pleadings and proof, all in violation of that state's own rules of appellate review?

2. Does the Fourteenth Amendment prohibition against the arbitrary and capricious taking of private property through state action protect a state court civil defendant from the imposition of a substantial money judgment against it for the breach of a contract, to which it admittedly was not a party?

NAMES OF ALL PARTIES, AND OF AFFILIATES OF PETITIONER

The names of the parties to the proceeding in the Court of Appeals of New Mexico are as follows: Wynn Exploration Co., Inc., Wynn Oil Company, R. C. Wynn, Southern Union Exploration Company (formerly known as Southern Union Supply Company), and Southern Union Company. AAA Operating Company, Inc. and Wynn Land Corporation are "affiliates" of Wynn Oil Company, but are not parties here and were not parties below.

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REPORTS OF OPINION

The opinion of the Court of Appeals of the State of New Mexico is reported as *Southern Union Exploration Co. v. Wynn Exploration Co., Inc.*, 95 N.M. 594, 624 P.2d 536. The denial of Wynn Oil Company's petition for writ of certiorari filed in the New Mexico Supreme Court is noted as *Wynn Oil Co. v. Southern Union Exploration Co.*, 95 N.M. 593, 624 P.2d 535.

JURISDICTION

The New Mexico Court of Appeals entered its judgment, which affirmed the liability portion of a trial court judgment against Petitioner, on January 13, 1981 (App. A).[1] On February 18, 1981, the New Mexico Supreme Court denied a timely petition for writ of certiorari (App. B). On March 10, 1981, the New Mexico Supreme Court granted a timely motion for rehearing of its order denying the petition for writ of certiorari (App. C). The New Mexico Supreme Court on July 22, 1981 vacated the March 10, 1981 order granting the motion for rehearing, and simultaneously denied the motion for rehearing (App. D). On August 26, 1981 the New Mexico Supreme Court entered its order denying a timely second motion for rehearing (App. E). Petitioner believes that 28 U.S.C. § 1257 confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV, § 1 provides, in pertinent part, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Background

This case originally arose as a dispute between joint venturers in an oil and gas exploration and development

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[1] References to the Appendix to this Petition are cited as "App."

project in Lea County, New Mexico. It had its genesis in a meeting between Oran Haseltine, vice president of Southern Union Supply Company (subsequently known as Southern Union Exploration Company, the Respondent in this case, and referred to hereinafter as "Southern Union"), and R. C. Wynn, president of two Texas corporations, Petitioner Wynn Oil Company ("Wynn Oil") and Wynn Exploration Company, Inc. ("Wynn Exploration"). After their initial discussions, Haseltine and R. C. Wynn signed a letter agreement dated September 8, 1975 (the "First Document"), and a printed form operating agreement dated September 15, 1975 (the "Second Document"), which bore the names of Southern Union and Wynn Oil. These two documents provided for a 75% interest in the project for Wynn Oil and a 25% interest for Southern Union.

Subsequently, an additional letter agreement, dated November 18, 1975 (the "Third Document") was signed by Haseltine on behalf of Southern Union and by R. C. Wynn on behalf of Wynn Exploration (App. I 7-8). This Third Document provided that the First and Second Documents were amended to the extent that the name of the party contracting with Southern Union was Wynn Exploration, not Wynn Oil, and that Wynn Exploration and Southern Union would share costs and obligations of the project on a 50-50, rather than a 75-25, basis. In a subsequent letter to a third party, Southern Union and Wynn Exploration stated that the purpose of the Third Document was "to reflect the correct reference to Wynn Exploration Company" (App. J 6-7).

Southern Union drilled and developed the wells on the project, and sent invoices for 50% of its expenses to Wynn Exploration. During the spring of 1976, relations between it and Wynn Exploration deteriorated. Wynn Exploration became convinced that Southern Union, through utilization of controversial and unproven stimulation techniques, had negligently destroyed the recoverability of billions of cubic

feet of natural gas reserves. Because the monetary value of the lost recoverable reserves far outweighed Wynn Exploration's 50% share of the drilling and operating expenses, and because of discrepancies in the Southern Union invoices submitted to Wynn Exploration, it withheld payment.

B. Trial Proceedings

In June of 1976, Southern Union sued Wynn Exploration and Wynn Oil to recover one-half of its costs of drilling and operating the six wells on the project in the Santa Fe, New Mexico, district court. Almost simultaneously, Wynn Exploration sued Southern Union in the Dallas County, Texas district court for breaches of the contract of the parties. The New Mexico trial court denied Wynn Oil's *forum non conveniens* motion to dismiss. Ultimately, Southern Union added R. C. Wynn, individually, as a defendant, Wynn Exploration counterclaimed against Southern Union, Wynn Exploration filed an independent suit in New Mexico against Southern Union and its parent, the Southern Union Company, for, *inter alia*, negligent operation of the wells and attendant loss of recoverable reserves, and the actions were consolidated for trial in Santa Fe County, New Mexico.

In its Third Amended (trial) Complaint, Southern Union alleged that the effect of the Third Document was to "substitute . . . Wynn Exploration in place of . . . Wynn Oil in the written Operating Agreement" (App. I-4 ¶8). Wynn Oil and Wynn Exploration both admitted this allegation (App. J-4 ¶7). Southern Union asserted that Wynn Oil should be liable along with Wynn Exploration because both corporations were allegedly the alter egos of R. C. Wynn. Southern Union did plead that if "Wynn Oil is not the alter ego of R. C. Wynn, then alternatively, Wynn Oil is directly liable for the damages set forth herein," but alleged no basis for said liability.

Most of the trial of the case, which lasted several weeks, was devoted to trying Wynn Exploration's claim against Southern Union. Concerning Southern Union's claim against Wynn Oil, Southern Union tried the case on the theory that there was only one contract, composed of the First, Second, and Third Documents, but that Wynn Oil should be liable for the payment of the Southern Union invoices on the alter ego theory. Southern Union conceded that Wynn Oil was not a party to the contract; in its post-trial brief it reiterated that the Third Document was executed to comply with the request that "Wynn Exploration Company, Inc. ('Wynn Exploration') be substituted for Wynn Oil as the contracting party on the Wynn side" (10 R. 3466).[2] In its post-trial brief, Southern Union also reiterated that its theory of recovery as against Wynn Oil Company was alter ego. It stated that it had alleged that Wynn Exploration and Wynn Oil were both the alter egos of R. C. Wynn "and that, therefore, all of the Defendants, including R. C. Wynn, are jointly and severally liable for the debt owed to SX" (10 R. 3484).

Approximately three months after the conclusion of the trial, the judge sent a letter opinion to counsel (App. F). Concerning Wynn Exploration's claim against Southern Union for negligent operation of the wells, he stated that he would rule against Wynn Exploration, even though its evidence on this issue "was impressive," and the explorations "might otherwise be done today" (App. F-5).[3] Con-

[2] References to those portions of the Record Proper below not included in the Appendix to this Petition are cited as "R." with volume and page numbers.

[3] At the trial, expert witnesses for both sides estimated that the Morrow formation underlying the property contained between 14.5 and 17.7 billion cubic feet of recoverable gas (VIII Tr. 136-37; IX Tr. 1408-09; X Tr. 1723; XIV Tr. 2617-19). An expert witness for Wynn Exploration testified that Southern Union's negligence had virtually destroyed the recoverability of the estimated reserves (VI Tr. 1052-53). This was vehemently denied by Southern Union's experts, who testified that Southern Union

cerning Southern Union's claims, the trial judge stated in this letter that he would not hold R. C. Wynn individually liable to Southern Union and that neither Wynn Oil nor Wynn Exploration was the alter ego of R. C. Wynn (App. F 2-3, 7). Inexplicably, however, the trial judge did state in the letter that he would enter judgment against Wynn Oil in addition to Wynn Exploration.

The trial judge at the close of his letter, which, to say the least, was less than a model of clear expression, invited request for clarification from counsel. By letter dated April 5, 1979 (10 R. 3595-96), counsel for Wynn Oil Company requested of the trial court clarification of its basis for holding Wynn Oil liable, as no theory had been pled or tried, other than the rejected alter ego theory, upon which to hold Wynn Oil liable. This request for clarification went unanswered by the court.

Faced with the task of proposing findings of fact that would support a judgment against Wynn Oil, after the alter ego theory — the only theory pled or tried — had been rejected, Southern Union suggested that the First, Second and Third Documents constituted the entire contract, that

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had not been negligent and that the reserves were still recoverable (XIV Tr. 2636-37). At a supersedeas bond hearing, both Wynn Oil and Wynn Exploration argued that a supersedeas bond should not be required since, according to Southern Union's expert witnesses at the trial, the value of Wynn Exploration's interest in the recoverable reserves vastly exceeded the judgment against them. Southern Union, however, then produced a new expert witness who admitted that Southern Union's conduct had greatly reduced the volume of recoverable reserves, and further testified that the value of Wynn Exploration's interest in the property was only $219,000 (15 June 1979 Hearing Tr. 30). In view of the extraordinary inconsistency between Southern Union's trial testimony and its supersedeas hearing testimony on the same matter, Wynn Oil and Wynn Exploration moved in the Court of Appeals for remand to the trial court, so that a motion for new trial could be filed, but the Court of Appeals denied the motion.

Wynn Oil was a party to all three documents, and that the Third Document effectuated an assignment by Wynn Oil of its rights to Wynn Exploration, but without an attendant release by Southern Union of Wynn Oil's obligation to it. The trial court adopted Southern Union's proposed assignment-without-release finding verbatim in findings of fact filed on April 27, 1979.

The trial court entered these findings, and companion conclusions of law and judgment, without ever having responded to the request for clarification made by Wynn Oil's counsel, and without having given Wynn Oil "a reasonable opportunity to submit requested findings of fact and conclusions of law," as required by the New Mexico Rules of Civil Procedure. The trial court granted Wynn Oil's motion to vacate the April 27, judgment, findings, and conclusions, and on May 10, 1979, Wynn Oil filed its requested findings of fact and conclusions of law. The next day, the Trial Court entered its May 11, 1979 Decision of the Court (App. G), with only a few very minor changes made to the prior findings and conclusions, and Judgment (App. H) against Wynn Oil and Wynn Exploration in the amount of $1,879,791.22.

For purposes of this proceeding, the two crucial trial court findings are numbers 4 and 5 (App. G 2-3). In finding number 4, the trial court found that the First, Second, and Third Documents together constituted "the entire agreement." In finding number 5, the trial court found that Wynn Oil was a party to all three documents, and that by the Third Document Wynn Oil assigned its rights to Wynn Exploration, but was not released of its obligations by Southern Union.

C. Appellate Proceedings

On appeal to the New Mexico Court of Appeals, Wynn Oil argued for the reversal of the judgment against it because finding number 5 was totally unsupported by the evidence, and because it had received no prior notice, by

pleadings or otherwise, of the assignment-without-release theory stated by the finding. Neither Southern Union nor Wynn Oil attacked finding number 4, however.

The Court of Appeals sustained Wynn Oil's attack on finding number 5. It held that Wynn Oil was not a party to the Third Document, and that the Third Document was not an assignment of rights from Wynn Oil to Wynn Exploration (App. A 8, 9). The Court of Appeals also rejected Southern Union's alter ego theory brought forward by it on its cross appeal. It did not expressly disturb the trial court's finding that all three documents together constituted the contract. Thus, the Court of Appeals rejected the alter ego theory — the only theory of Wynn Oil's liability pled or tried by Southern Union — and also rejected the trial court's party-to-the-Third Document/assignment-without-release theory — the only basis for the trial court's judgment. Even though Wynn Oil had prevailed on every point briefed, the Court of Appeals affirmed on yet another theory — one that had not been pled, tried, found or briefed: Wynn Oil was liable for the breach of the three-document contract because it was a party to the First and Second Documents (App. A 4, 9).

D. Federal Questions

Baffled by the affirmance of the judgment against it, Wynn Oil sought redress in the New Mexico Supreme Court by way of a petition for writ of certiorari. In its petition, Wynn Oil argued that the Court of Appeals judgment should be reversed because it had no notice prior to, or during, trial of either the theory of liability used by the trial court, which was rejected by the Court of Appeals, or of the theory of liability utilized by the Court of Appeals; that the Court of Appeals had reversed the only finding of fact on which Wynn Oil's liability could be predicated, and had made its own implicit fact findings contrary to the pleadings and proof, in flagrant violation of well-established

principles of New Mexico appellate practice; and that the judgment held Wynn Oil liable for the breach of a contract to which it concededly was not a party (App. K). The New Mexico Supreme Court denied the petition on February 18, 1981 (App. B). Wynn Oil, incredulous that the New Mexico Supreme Court could possibly allow the Court of Appeals' judgment to stand, filed a timely motion for rehearing in which it stressed the arbitrary nature of the Court of Appeals' judgment (App. L). On March 10, 1981, the New Mexico Supreme Court granted the motion for rehearing (App. C).

On July 22, 1981, without explanation, the New Mexico Supreme Court vacated its March 10, 1981 order, and denied the motion for rehearing (App. D). Wynn Oil — now realizing that the New Mexico Supreme Court might actually tolerate the Court of Appeals' violation of principles of procedural and substantive law fundamental to the Anglo-American system of jurisprudence — filed its second motion for rehearing, in which it stated that the trial court's entry of a judgment against it on a theory of which it had had no notice and no opportunity to be heard before or during the trial, which was based on implicit fact finding made by the Court of Appeals against the evidence, and which arbitrarily and capriciously held Wynn Oil liable for the breach of a contract to which it admittedly was not a party, violated the Fourteenth Amendment (App. M). This Second Motion for Rehearing was denied by order dated August 26, 1981 (App. E).

REASONS FOR GRANTING THE WRIT

A. This Court Should Remind the State Courts that the Fourteenth Amendment Guarantees to Civil Litigants Notice, Opportunity to be Heard, and Even-Handed and Rational Adjudication.

The New Mexico courts have entered a ruinous money judgment against a defendant, who unquestionably won every material point properly raised in the trial and ap-

pellate courts, by unsupported, ipse dixit fiat. They have acted in such an arbitrary and capricious manner as to deprive Wynn Oil of its rights under the Fourteenth Amendment.

This Court long ago established that state courts must afford to a civil litigant "an opportunity to be heard and to defend its substantive right." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 218 U.S. 673, 678 (1930) (referred to hereinafter as *"Brinkerhoff-Faris"*). A state court civil judgment cannot withstand Fourteenth Amendment scrutiny if it "amounts to mere arbitrary or capricious exercise of power, or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.'" *American Ry. Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927).

No American court would publicly take exception to these fundamental constitutional principles governing civil litigation in the state courts. The New Mexico courts in this case have not stated that Wynn Oil was not entitled to notice and an opportunity to be heard, or that Wynn Oil was not entitled to have its case decided upon appeal on the same basis as any other similarly situated litigant, or that Wynn Oil was not entitled to a rational adjudication of its rights. But just as surely as the New Mexico courts would not ever admit to having violated these Fourteenth Amendment rights, they in fact have violated them.

The failure of the New Mexico courts to observe the minimal standards required by the Fourteenth Amendment is no less an affront to the Constitution, and no less reviewable by this Court, because they did not expressly discuss the constitutional issues. In *Brinkerhoff-Faris*, in a remarkably similar situation, the Missouri Supreme Court rejected the theory underlying the trial court's judgment against the petitioner, but then proceeded to affirm that judgment on a completely different theory that to that point

had not been pled, tried, or suggested. 281 U.S. at 677. The petitioner then filed a petition for rehearing in the state court, in which it argued that the court's action violated the due process clause of the Fourteenth Amendment, which was denied without opinion. *Id.* at 678. Even though the state court had not expressly spoken to the due process issue, this Court granted the petition for writ of certiorari and reversed the case, because the state court had violated the petitioner's due process rights, and the petitioner had raised the due process issue below. Similarly, in *Saunders v. Shaw*, 244 U.S. 317, 319 (1917), this Court held that the constitutional issue had been raised in a timely fashion for the first time in a motion for rehearing, where the state appellate court had violated Saunders' Fourteenth Amendment right by ruling against him at the end of the proceeding in an unexpected fashion that deprived him of "the proper opportunity to present his evidence."

Thus, this Court clearly has jurisdiction to grant Wynn Oil's Petition. Wynn Oil understands that notwithstanding that in this Court lies its final hope for relief from a very substantial, unconstitutional money judgment, this Court might be tempted to deny the Petition on the basis that the arbitrary and capricious actions below constituted an isolated aberration, not likely to be repeated, and that therefore the ultimate outcome of this case will have little effect on those not parties to it. Wynn Oil's experience, however, should not be dismissed as a small island of irrationality in a sea of state court judicial reasonableness. Complex, multiparty business litigation spanning interstate boundaries involving millions of dollars increases constantly. Many of these cases are tried in the state courts.[4] One author has

[4] Wynn Oil is a Texas corporation; although Southern Union is a Delaware corporation, its principal place of business is in Texas. Because of lack of diversity of citizenship, Wynn Oil could not remove the case to federal court. Wynn Oil filed a motion to dismiss this case on the basis of *forum non conveniens* (1 R. 47) in an effort to have the case tried in the Texas courts, but the trial court denied the motion (App. D-7, Conclusion of Law No. 2).

suggested that the increase in the complexity of some of the business litigation in the last 25 years equals the increase in complexity in such litigation during the preceding 150 years. Lynch, *The Case for Striking Jury Demands in Complex Antitrust Litigation,* 1 Rev. of Litigation 3, 5 (1980). Whether it be due to lack of experience, ability, or judicial temperament, or whether it be due to other reasons, the New Mexico courts in this case produced an unconstitutionally irrational result. They can be expected to produce similarly irrational results in similarly complex cases. In order to remind the state courts in this day of very large, complex cases that they must treat the litigants before them in an even-handed fashion and must decide these cases rationally, this Court should grant this Petition, and reverse the courts below.

B. The New Mexico Courts Deprived Petitioner of Notice and an Opportunity to be Heard, in Violation of The Decisions of this Court.

No one would argue against the proposition that the Fourteenth Amendment entitles a state court civil defendant to notice of the claims against him, and an opportunity to be heard in his own defense. Thus, a state appellate court cannot sustain a civil defendant's attack on the factual underpinnings of a lower court judgment against him, but then affirm the judgment on a theory that has not been pled, tried, or briefed, because to do so deprives the defendant of his notice and opportunity to defend on the merits. *Brinkerhoff-Faris, supra; see Sotomura v. County of Hawaii,* 460 F. Supp. 473, 477 (D. Hawaii 1978); *Robinson v. Ariyoshi,* 441 F. Supp. 559, 580 (D. Hawaii 1977). "Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet,* 405 U.S. 56, 66 (1972). A state appellate court violates due process when it decides a case on a theory upon which the civil

defendant has not had "the proper opportunity to present his evidence." *Saunders v. Shaw*, 244 U.S. 317, 319 (1917).

The Court of Appeals found Wynn Oil liable on the basis of the First and Second Documents (App. A 4-5). Thus, the Court of Appeals implicity found that these two documents, standing alone, constituted a valid contract that had been breached by Wynn Oil (App. K, L). Southern Union, however, pled only a contract consisting of the First, Second, and Third Documents, after trial specifically reiterated that the contract in issue consisted of all three documents (10 R. 3477), and requested — and *only* requested with respect to finding a contract — that the trial court find that the contract consisted of all three documents.

The trial court exactly so found — not more, not less, and nothing different (App. G 2-3, Finding of Fact No. 4). Wynn Oil defended the case against this theory, and ultimately won this point. It was never given the opportunity to present its evidence in defense of the different theory that first saw the light of day in the Court of Appeals. By entering a judgment against Wynn Oil of which it had no prior notice and no opportunity to present its defenses and evidence, the Court of Appeals ignored the teachings of *Brinkerhoff-Faris*, *Lindsey v. Normet*, and *Saunders v. Shaw*.

C. The New Mexico Courts Deprived Petitioner of Fair, Rational Treatment on Appeal, in Violation of the Decisions of this Court.

The equal protection and due process guarantees of the Fourteenth Amendment both protect state court appellants from arbitrary, capricious, or discriminatory treatment from the courts. *See Lindsey v. Normet*, 405 U.S. 56, 77 (1972). The New Mexico courts themselves have recognized that due process requires a state decision-making body to comply with its own procedures and guidelines. *Miller v. City of Albuquerque*, 89 N.M. 503, 507, 554 P.2d 665, 669

(N.M. 1976). This requirement extends to state appellate courts. *Robinson v. Ariyoshi*, 441 F. Supp. 559, 563, 580 (D. Hawaii 1977).

Perhaps no principle of appellate review is more firmly ingrained in New Mexican jurisprudence than that where an appellate court reverses the fact finding made by the trial court upon which its judgment against the defendant rests, it must reverse the judgment. It cannot proceed to make its own fact findings, on disputed evidence, to support the judgment on a different theory. *Guidry v. Petty Concrete Co.*, 77 N.M. 531, 534, 424 P.2d 806, 808 (N.M. 1967) (an appellate court "will not originally determine . . . questions of fact" not decided by the trial court). The Court of Appeals, without justification or excuse, arbitrarily violated this basic, binding tenet of appellate review in affirming the judgment against Wynn Oil, even though it reversed the crucial finding of fact on which it rested, by implicitly finding facts, contrary to the pleadings and proof, not found by the trial court (App. K, L). The Court of Appeals failed to afford Wynn Oil the even-handed, rational treatment to which it was entitled.

D. The New Mexico Courts Imposed a Very Substantial Judgment on Petitioner on an Arbitrary, Irrational and Capricious Basis, in Violation of the Decisions of this Court.

The Fourteenth Amendment forbids a state court judgment if it "amounts to mere arbitrary or capricious exercise of power, or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.'" *American Ry. Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927). If a case "between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the court so deciding had jurisdiction over the suit,

the judgment may be in violation of the 14th Amendment." *Williams v. Tooke*, 108 F.2d 758, 759 (5th Cir.), *cert. denied*, 311 U.S. 655 (1940).

The Court of Appeals did not disturb the trial court's finding that the First, Second, and Third Documents together constituted the only contract. It did reverse the trial court's finding that Wynn Oil was a party to the Third Document (App. 8-9). Despite the finding by the Court of Appeals that Wynn Oil was not a party to the Third Document and thus not a party to the only contract found by the trial court, the Court of Appeals, without comprehensible explanation, held Wynn Oil liable for its breach.

Probably nothing is clearer in the law of contracts than that a person cannot be held liable for the breach of a contract to which he is not a party. *Barnes v. Sadler Associates, Inc.*, 95 N.M. 334, 622 P.2d 239 (N.M. 1981); *Gallup Electric Co. v. Pacific Improvement Co.*, 16 N.M. 86, 113 P. 848 (1911); *see* App. L-4. Such a gross deviation from such familiar and well-settled law constitutionally cannot be tolerated. Due process requires that a judgment for an amount in excess of one and one-half million dollars be predicated on a rational rule of law. The judgment here simply is not.

E. Conclusion

The New Mexico courts have violated Wynn Oil's rights to notice and an opportunity to present its evidence and defenses; have arbitrarily and discriminatorily violated their own rules of appellate review; and have entered a very substantial judgment against it on a substantively irrational basis. Although this Court does not frequently review state-court commercial cases, total relaxation of constitutional oversight can and will allow constitutionally irrational decision making in the state courts. Petitioner's last hope of vindication lies in this Court, which should

grant the Petition not only to do justice between these parties, but to make clear to other state courts that the Constitution does not tolerate arbitrary, capricious and irrational adjudication.

Premises considered, Petitioner Wynn Oil Company respectfully prays that this Court grant this Petition for Writ of Certiorari, and that it issue a writ of certiorari to review the judgment of the New Mexico Court of Appeals and the orders of the New Mexico Supreme Court.

Respectfully submitted,

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Dated: November 23, 1981

APPENDIX

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(C) March 10, 1981 Order

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(F) March 19, 1979 letter from the trial judge to counsel

(G) May 11, 1979 Decision of the Court (including Findings of Fact and Conclusions of Law)

(H) May 11, 1979 Judgment

(I) Third Amended Complaint (exclusive of those portions pertaining to causes of action other than the First Cause of Action, and exclusive of Exhibits other than Exhibit C)

(J) Answer of Defendants, R. C. Wynn, Wynn Exploration Company, Inc. and Wynn Oil Company to Third Amended Complaint (exclusive of responses to causes of action other than the First Cause of Action, affirmative defenses, counterclaims, prayer, and exhibits other than the February 13, 1976, letter)

(K) Third Point of Petition for Writ of Certiorari

(L) Motion for Rehearing

(M) Second Motion for Rehearing

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. 4168

SOUTHERN UNION EXPLORATION COMPANY,
Plaintiff-Counterdefendant,
Appellee-Cross-Appellant,

and

SOUTHERN UNION COMPANY,
Counterdefendant-Appellee,

v.

WYNN EXPLORATION COMPANY, INC. and
WYNN OIL COMPANY,
Defendants-Appellants,
Cross-Appellees,

and

R. C. WYNN,
Defendant-Cross-Appellee.

Consolidated

No. 4262

SOUTHERN UNION EXPLORATION COMPANY,
Plaintiff-Appellee,

v.

WYNN EXPLORATION COMPANY, INC.,
Defendant-Appellant.

(continued)

APPEALS FROM THE DISTRICT COURT OF SANTA FE COUNTY

KAUFMAN, Judge

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Attorneys for Wynn Exploration, Inc., Wynn Oil Company and R. C. Wynn

COURT OF APPEALS OF NEW MEXICO
FILED
JANUARY 13, 1981
SUSAN H. BAGWELL

OPINION

WOOD, Judge.

After almost 2,000 pages of pleadings (the record proper totals 3,900 pages), these oil business litigants finally framed the issues on which this case was tried in a third amended complaint, answer and counterclaim. After some 3,500 pages of trial proceedings, plus voluminous exhibits, the trial court's findings eliminated most of the legal theories asserted. It is unnecessary to catalog the various claims made because appellant, in Cause No. 4262, has abandoned that appeal, and the issues for decision in Cause No. 4168 are all based on a breach of contract. This Court's jurisdiction, however, is based on claims of fraud (tort claims) alleged in the third amended complaint and counterclaim. See § 34-5-8(A), N.M.S.A. 1978; Citizens Bank v. C & H Const. Co. & Paving Co., Inc., 89 N.M. 360, 552 P.2d 796 (Ct.App. 1976).

SX (Southern Union Exploration Company) entered written agreements with one or more of the Wynn defendants for the exploration and development of oil and gas property. The Wynn defendants are R. C. Wynn, Wynn Oil (Wynn Oil Company) and Wynn X (Wynn Exploration Co., Inc.). Wynn Oil and Wynn X are Texas corporations; R. C. Wynn is the sole stockholder of each corporation. Payments due to SX pursuant to the agreements were not made; SX sued to collect those payments and to foreclose an operator's lien. The trial court entered judgment against Wynn Oil and Wynn X, and foreclosed the lien. The liability of Wynn X is not contested. The issues to be discussed are: (1) Apart from Wynn X, who is liable?; (2) the amount of the judgment; and (3) attorney fees.

Apart from Wynn X, Who is Liable?

(a) Issue Pled and Tried

Wynn Oil contends it cannot be held liable because liability of Wynn Oil under the agreements was neither pled nor tried. This contention is frivolous. R.Civ.Proc. 8(a) provides for notice pleading sufficient to enable the adverse party to answer and prepare for trial. Malone v. Swift Fresh Meats Co., 91 N.M. 359, 574 P.2d 283 (1978). In paragraph 3 of the first cause of action, labeled Breach of Written Agreement, SX alleged that Wynn Oil was the alter ego of R. C. Wynn, but if Wynn Oil was not the alter ego of R. C. Wynn, then Wynn Oil was "directly liable for the damages set forth herein." The damages claimed were the failure to pay amounts due under the written agreements. Wynn Oil's answer denied liability under the agreements and, in an affirmative defense, alleged that Wynn Oil was not obliged to SX "by reason of any contract . . ." Wynn Oil had notice in the pleading of SX's contract claim. The contracts were introduced into evidence and the trial court made a finding as to the documents constituting the agreement. The contract claim against Wynn Oil was tried.

(b) Party to Contract

Wynn Oil claims it was not a contracting party. The trial court found that three documents constituted the contract. The first two of these documents — a letter agreement addressed to Wynn Oil and an operating agreement — show they were agreed to and accepted by Wynn Oil. These documents were executed on behalf of Wynn Oil by R. C. Wynn, President. The contents of these two documents provide a basis for the judgment against Wynn Oil.

R. C. Wynn testified that he never intended to make Wynn Oil a party to the agreement. The controlling intent of a party is his expressed assent and not his secret or

undisclosed intent. State ex rel. Santa Fe Sand & G. Co. v. Pecos Const. Co., 86 N.M. 58, 519 P.2d 294 (1974); Higgins v. Cauhape, 33 N.M. 11, 261 P. 813 (1927).

R. C. Wynn also testified that the documents showing Wynn Oil as a contracting party were a mistake. Wynn Oil claims this testimony was uncontradicted. Wynn Oil is incorrect. A witness for SX who negotiated with R. C. Wynn concerning the contract and who directed the preparation of the documents, testified: "[M]y understanding that we had that Mr. Wynn wanted to put the deal in Wynn Oil Company's name...."

Wynn Oil claims the trial court committed manifest error in finding that Wynn Oil was a party to the agreement. In support of this argument, Wynn Oil reviews the evidence in the light most favorable to its position and, in effect, asks this Court to find the facts in its favor. Such is not proper. State v. Gonzales, 82 N.M. 388, 482 P.2d 252 (Ct.App. 1971). The trial court determines the credibility and weight of the evidence; we review the evidence in the light most favorable to SX, the successful party. Cave v. Cave, 81 N.M. 797, 474 P.2d 480 (1970).

The two documents signed by Wynn Oil, and the testimony of the SX witness concerning the negotiations and preparation of these documents are substantial evidence supporting the finding that Wynn Oil was a party to the contract.

(c) Admissions

Under this item (c) and in the following item (d), we discuss Wynn Oil's arguments that even though originally a contracting party, it was subsequently relieved of any obligation under the contract. These arguments involve the third document found by the trial court to be a part of the contract. This third document was signed by Wynn X.

Wynn Oil claims that in a post-trial brief, prior to findings, SX admitted that the third document substituted Wynn X for Wynn Oil as a contracting party. Wynn Oil also claims an admission by SX resulted from the way SX pleaded the third document in the third amended complaint, and Wynn Oil's admission in its answer that this allegation was correct. Assuming, but not deciding, that these two items can properly be characterized as admissions, what is the effect of the admissions?

Wynn Oil asserts that if unexplained or uncontradicted, the admissions were binding and conclusive upon SX, citing Turner v. Silver, 92 N.M. 313, 587 P.2d 966 (Ct.App. 1978), and that the admissions were neither contradicted nor explained. There are two answers to this argument.

First, Turner v. Silver, supra, expresses only the opinion of its author, Judge Sutin; other members of the panel did not join in Judge Sutin's opinion. Thus, with respect to the effect of admissions, *Turner* is not a decision of the Court of Appeals. Casias v. Zia Co., 94 N.M. , 616 P.2d 436 (Ct.App. 1980). Judge Sutin's opinion is based on a Kansas decision. We apply New Mexico law. An admission in pleadings, or in testimony, is sufficient to support a finding. Feldhut v. Latham, 60 N.M. 87, 287 P.2d 615 (1955); Lujan v. Gonzales, 84 N.M. 229, 501 P.2d 673 (Ct.App. 1972). However, an admission "is by no means conclusive. . . . [T]he admission is only one factor to be considered together with the other evidence." Michael v. Bauman, 76 N.M. 225, 413 P.2d 888 (1966). See also Albright v. Albright, 21 N.M. 606, 157 P. 662 (1916). If an admission was neither contradicted nor explained, the effect to be given the admission would depend upon the application of the uncontradicted evidence rule set forth in Medler v. Henry, 44 N.M. 275, 101 P.2d 398 (1940).

Second, the assumed admissions were contradicted by the express wording of the third document; this wording is set forth in item (d).

(d) Novation

Wynn Oil claims the third document of the contract amounted to a novation which substituted Wynn X for Wynn Oil as a contracting party. See Dougherty, et al v. Van Riper, 16 N.M. 600, 120 P. 333 (1911). Wynn Oil's argument that a novation was established by pleadings amounting to an admission was answered in (c) above. Wynn Oil contends that the trial court ruled on the question of novation by rejecting certain of its requested findings. Assuming, but not deciding, that the trial court did rule there was no novation, the question is whether, under the evidence, this ruling was wrong.

All of the documents to the contract were executed in Texas and the contract was formed there; Texas law applies. Satterwhite v. Stolz, 79 N.M. 320, 442 P.2d 810 (Ct.App. 1968). Thus, we do not consider the non-Texas authorities relied on by Wynn Oil.

Russell v. Northeast Bank, 527 S.W.2d 783 (Tex.Civ.App. 1975) states:

> To effect a novation by the substitute of one debtor for another and thereby release the first party, there must be an agreement to that effect between all three parties.

Ridgleawood, Inc. v. White, 380 S.W.2d 766 (Tex.Civ. App. 1964) states:

> A requisite of novation is that parties to the previous contract and the new one agree that the obligations of the new be substituted for and operate as a discharge of the obligations of the first.

Allstate Insurance Company v. Clarke, 471 S.W.2d 901 (Tex.Civ.App. 1971) states:

> Whether a subsequent agreement works a novation is a question of intention. For there to be a novation it

must clearly appear such was the intention of the parties. Novation is never presumed.

The third document, asserted to be a novation, is a letter agreement addressed to Wynn X by SX which was agreed to and accepted by Wynn X. As Wynn Oil correctly asserts: "No one executed this document on behalf of Wynn Oil. Manifestly, Wynn Oil was not a party to this agreement . . ." This third document made two changes in the agreement reflected by the first two documents of the contract. First, the share of costs and obligations to be paid to SX was reduced from 75 percent to 50 percent. Second, Wynn X, the addressee, was "desirous of the change in name of your Company from Wynn Oil Company to Wynn Exploration Company." This third document went on to state that the first letter agreement was amended accordingly, however the first letter agreement remained in full force and effect "except as herein specifically amended."

A letter exhibit requesting an assignment pursuant to a farmout agreement, which referred to this third document as "correcting" the first letter agreement, was signed by SX and Wynn X. R. C. Wynn's testimony concerning this third document can properly be understood as referring to R. C. Wynn's intentions as an individual and not as referring to the intentions of Wynn Oil.

The trial court could properly view the evidence as showing that Wynn Oil never agreed to be released, Russell v. Northeast Bank, supra; that the third document changed the corporate name but did not discharge Wynn Oil's liability, Ridgleawood, Inc. v. White, supra; and that SX, Wynn X and Wynn Oil never intended a novation, Allstate Insurance Company v. Clarke, supra. If the trial court did in fact rule on the question of novation by rejecting Wynn Oil's requested findings, we cannot hold, under the evidence, that the ruling was incorrect.

(e) Miscellaneous

The trial court found that by the third (change of name) document, Wynn Oil assigned its rights to Wynn X. This is incorrect because the document was not executed by Wynn Oil and there are no words of assignment in the document. This has no effect on the liability of Wynn Oil for its obligations under the first two documents.

The trial court's findings referred to Wynn Oil and Wynn X "jointly as Wynn." This joint reference provides no basis for a reversal inasmuch as Wynn X is not contesting its liability and inasmuch as Wynn Oil is liable on the basis of the documents it executed.

(f) Alter Ego

In its cross-appeal, SX contends the corporate veil of Wynn Oil and Wynn X should be pierced and liability should be imposed upon R. C. Wynn individually. SX's theory is that the two corporations are the alter ego of R. C. Wynn, that there is such a unity of interest and ownership between the corporations and R. C. Wynn that the corporations are no more than corporate shells utilized by R. C. Wynn to conduct his personal business, that R. C. Wynn has manipulated the assets and operations of the corporations "in an effort to make SX's judgment wholly or partly uncollectible," that the trial court's failure to pierce the corporate veil works an injustice and promotes fraud. See Scott Graphics, Inc. v. Mahaney, 89 N.M. 208, 549 P.2d 623 (Ct.App. 1976).

SX presents this argument by analyzing factors pertinent to a "piercing" decision. See Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal.App.2d 825, 26 Cal.Rptr. 806 (1962). In doing so, it proceeds in the same improper manner as did Wynn Oil in arguing that it was not a party to the contract — that is, by reviewing the evidence in the light most favorable to its position. The same SX witness

who testified that R. C. Wynn wanted the deal in Wynn Oil's name also testified that it made no difference to him whether the contracting party was R. C. Wynn or Wynn Oil. A permissible inference from this testimony is that SX knowingly dealt with a corporation in which R. C. Wynn owned the stock rather than with R. C. Wynn individually.

"A corporation and a stockholder, even though that stockholder be the owner of the vast majority of the stock, are separate entities." London v. Bruskas, 64 N.M. 73, 324 P.2d 424 (1958); see Shillinglaw v. Owen Shillinglaw Fuel Company, 70 N.M. 65, 370 P.2d 502 (1962). "[T]he corporate entity should be recognized and supported"; limited liability is the rule, not the exception. Scott Graphics, Inc. v. Mahaney, supra. Piercing the corporate veil by the device of the alter ego is an equitable remedy. Associated Vendors, Inc. v. Oakland Meat Co., supra.

The trial court could properly view the evidence as establishing that SX knowingly contracted with Wynn Oil rather than R. C. Wynn individually, and that an asserted inability to collect all of its judgment from Wynn Oil was not a basis for relieving SX from a choice knowingly made. The trial court did not err in refusing to find R. C. Wynn individually liable to SX on an alter ego theory.

Amount of the Judgment

(a) The Issue of Excessiveness

Wynn Oil and Wynn X claim the amount of the judgment was excessive. SX contends the question of excessiveness was not preserved for review because the Wynn corporations neither moved to amend the judgment nor tendered specific findings as to the amount due. SX is incorrect. Requested findings were submitted on behalf of all of the Wynn defendants. Requested finding No. 29 was to the effect that SX had never supplied an accurate accounting

of the expenses incurred and that the accounting at the time of trial was deficient. This request sufficiently preserved for review the question of the amount of the judgment and the findings on which that amount was based. Van Orman v. Nelson, 78 N.M. 11, 427 P.2d 896 (1967).

(b) Amount of Excessiveness

Wynn Oil and Wynn X claim the judgment is excessive by at least $276,385.00 and by the computation of post-judgment interest. We do not attempt to calculate the amount of the excessiveness; that can be better done by the trial court with the assistance of counsel. The following paragraphs respond to the arguments under this issue, and these responses are to guide the trial court and counsel in recalculating the judgment and interest.

(c) Amount of the Liability for Costs and Expenses

The trial court found Wynn Oil and Wynn X liable for 50 percent of SX's costs and expenses. This percentage amount has not been disputed. The trial court concluded that Wynn Oil and Wynn X, as of November 1, 1978, owed SX $1,879,791.22 and entered judgment for that amount on May 11, 1979. This is an incorrect sum.

First, the trial court found that $279,707.78 of the judgment amount was unpaid interest through October 31, 1978. We discuss the interest question in subsequent paragraphs. Subtracting the interest item, the liability for costs and expenses should have been $1,600,083.44. The trial court's finding, however, was for $1,565,216.01. This discrepancy, of $34,867.43, appears in SX's proof which shows this amount owed for operating costs and delay rental. We do not know whether the trial court intended to disallow the $34,867.43 item; the discrepancy between the finding and the conclusion is to be resolved on remand.

Second, whether or not the trial court intended to disallow the $34,867.43 item, the amount of costs and expenses

owed by the Wynn corporations is to be recalculated on remand in accordance with the operating agreement (previously referred to herein as the second document of the contract). Exhibit C to that agreement, a standardized form for "Accounting Procedure", provided that the operator, SX, was to bill the nonoperators, Wynn Oil and Wynn X "on or before the last day of each month for their proportionate share of costs and expenses for the preceding month. Such bills will be accompanied by statements reflecting the total charges and credits . . ." SX's proof was to the effect that as of October 31, 1978, the Wynn corporations had credits in excess of $215,000.00. It is undisputed that this credit had not been applied against the amount SX claimed as due and, thus, the credits could not have been applied on a monthly basis as provided by the operating agreement.

(d) The Interest Rate

The trial court found that SX was entitled to interest at the rate of 10 percent per annum on the amount of costs and expenses due from the Wynn corporations, and unpaid. The Wynn corporations claim the interest rate should have been 9 percent. Paragraph 8 of the operating agreement authorized SX to demand and receive advance payments of estimated costs. Upon failure to pay an advance estimate within the time provided, "the amount due shall bear interest at the rate of nine percent (9%) per annum until paid." However, under the monthly billing provision in the "Accounting Procedure", "the unpaid balance shall bear interest monthly at the rate of ten per cent (10%) per annum . . ." The Wynn corporations contend these provisions are inconsistent. They are wrong. The 10 percent interest rate applied unless the amount unpaid was a billing for an advance estimate. The Wynn corporations do not claim any of the amount they owe SX was for advance estimates. The trial court correctly found that the interest rate on unpaid balances was 10 percent per annum.

(e) Calculating the Interest Rate

The operating agreement provided that the 10 percent annual interest rate was to be calculated on each unpaid billing and there is testimony that this was done. There is evidence that the total interest due, as of October 31, 1978, was $279,707.78. To the extent this interest was calculated on a balance which should have been reduced by credits (see item c), it is excessive.

The trial court awarded, in a conclusion carried forward into the judgment, an improper interest amount between the October 31, 1978 date to which interest was figured, and the date judgment was entered. The judgment amount was for $1,879,791.22. Of this amount, $279,707.78 was interest. The judgment provides for "interest on such sum from November 1, 1978, until entry of this judgment, at the rate of 10% per annum, and thereafter interest on the judgment at the rate of 10% per annum until paid in full."

We are not concerned with the rate of interest. The unpaid balance bears interest at 10 percent pursuant to the contract; the judgment amount would also bear interest at 10 percent. See § 56-8-4, N.M.S.A. 1978 (1980 Cum.Supp.). Interest accrued to date of judgment may be properly included within the judgment amount. O'Meara v. Commercial Insurance Company, 71 N.M. 145, 376 P.2d 486 (1962). Any interest included within the judgment amount bears interest at 10 percent, but that is because the judgment bears interest.

The error was in allowing interest at 10 percent on the $279,707.78 interest item from October 31, 1978 until entry of judgment on May 11, 1979. The contract provides only for simple interest and thus did not authorize interest on interest. SX does not point to any statute authorizing interest on interest, prior to entry of judgment. Absent either a contract or statutory provision authorizing interest on interest prior to judgment, such may not be recovered. See

Mississippi Valley Trust Co. v. Oklahoma Ry. Co., 156 F.2d 283 (10th Cir. 1946); Watkins & Faber v. Whiteley, 592 P.2d 613 (Utah 1979).

(f) SX contends any error resulting from findings insufficient to support the judgment amount, from failure to apply credits at the time provided in the contract, from calculating interest on amounts that should have been reduced by credits, and from calculating interest on interest prior to judgment was either waived or was corrected when the trial court approved the report of a special master's sale.

Wynn Oil superseded the judgment agai ' lt; Wynn X's interest in certain property was sold by a special master, and the special master's report was approved by the trial court.

Wynn Oil was not involved in the special master proceedings; those proceedings have no bearing on Wynn Oil's attacks on the amount of the judgment.

Neither the special master's report nor the order approving the report identify any errors in the judgment or purport to correct any such errors; rather, the improper judgment amount is utilized in both the report and the order. SX's brief attempts to show that the errors were corrected but fails in that attempt; the effect of the brief is to highlight the errors of calculation.

SX claims Wynn X waived any right to have the errors corrected by failing to appeal from the order approving the special master's sale. We disagree. Wynn X had appealed the propriety of the judgment prior to the special master's sale; its attack on the propriety of the judgment amount was not waived by not taking a second appeal involving the same issue.

(g) The judgment of liability against Wynn Oil and Wynn X, entered May 11, 1979, is affirmed. The cause is

remanded to the trial court to correct errors in the amount of the judgment and the references to the incorrect amount in the order approving the special master's sale. The correction is to be in accordance with the above discussion.

Attorney Fees

In its cross-appeal, SX contends the trial court erred in refusing to award it attorney fees.

(a) Basis for Attorney Fees

Absent an authorizing statute or rule of court, or the applicability of an exception such as those discussed in Aboud v. Adams, 84 N.M. 683, 507 P.2d 430 (1973), attorney fees are not recoverable. SX relies on § 36-2-39, N.M.S.A. 1978 which provides:

> In any civil action in the district court . . . to recover on an open account, the prevailing party may be allowed a reasonable attorney fee set by the court, and taxed and collected as costs.

(b) Meaning of Open Account

"Open account" in § 36-2-39, supra, does not mean an amount owed on a single transaction. Lujan v. Merhege, 86 N.M. 26, 519 P.2d 122 (1974). Nor does it mean an account stated. Tabet Lumber Company v. Chalamidas, 83 N.M. 172, 489 P.2d 885 (Ct.App. 1971).

"Open account" was defined in Gentry v. Gentry, 59 N.M. 395, 285 P.2d 503 (1955) as follows:

> [A]n account usually and properly kept in writing, wherein are set down by express or implied agreement of the parties concerned a connected series of debit and credit entries of reciprocal charges and allowances, and where the parties intend that the individual items of the account shall not be considered independently,

> but as a continuation of a related series, and that the account shall be kept open and subject to a shifting balance as additional related entries of debits or credits are made thereto, until it shall suit the convenience of either party to settle and close the account, and where, pursuant to the original, express, or implied intention, there is to be but one single and indivisible liability arising from such series of related and reciprocal debits and credits, which liability is to be fixed on the one party or the other, as the balance shall indicate at the time of settlement or following the last pertinent entry of the account.

This definition is the meaning of open account in § 36-2-39, supra. Lujan v. Merhege, supra; Tabet Lumber Company v. Chalamidas, supra.

(c) Was There an Open Account?

The Wynn corporations assert there could not be an open account in this case, citing Texas cases defining "open" and "sworn" accounts. The Wynn corporations argue that "[w]here the contract of the parties expressly defines their respective rights and obligations, no open account results." We reject this contention as too extreme.

Our view is that under the evidence the trial court could properly refuse to find an open account under New Mexico law, or a "sworn account" as defined by Texas law. See Carter v. Hegar, 595 S.W.2d 612 (Tex.Civ.App. 1980); Tex. Rev. Civ. Stat. Ann. art. 2226 (Vernon). The evidence which supports this refusal is found in the terms of the contract, specifically, the operating agreement and the attached "Accounting Procedure". See Carter v. Hegar, supra; French v. Joseph E. Seagram & Sons, Inc., 439 S.W.2d 448 (Tex.Civ.App. 1969).

New Mexico's definition of open account, Gentry v. Gentry, supra, requires "a connected series of debit and credit

entries of reciprocal charges and allowances," an account to be "kept open and subject to a shifting balance . . . until it shall suit the convenience of either party to settle and close" with "but one single and indivisible liability arising from such series . . . fixed . . . as the balance shall indicate at the time of settlement or following the last pertinent entry . . ." This is the generally accepted definition of "open account" most frequently found in American case law. See 1 Tex.Jr.3d *Accounts and Accounting,* §§ 2 and 3 (1979) at 123; 1 Am.Jur.2d *Accounts and Accounting,* § 4 (1962) at 373, and cases therein cited.

The operating agreement was for 90 days and as long thereafter as specified conditions existed; liability accruing under this term could not be settled or closed at the convenience of the parties.

The Accounting Procedure negates a one, single and indivisible liability fixed at the time of settlement. Rather, the Accounting Procedure provides for monthly billings to be paid within fifteen days after receipt of the bill and thus contemplates divisible liabilities.

The Accounting Procedure provides for adjustments and reaches (we need not consider whether this reach was successful) for an account stated by a provision that a bill (any monthly bill) "shall conclusively be presumed to be true and correct" absent written exceptions to the bill within a specified time period.

The trial court did not err in refusing SX's requested finding that there was an open account. There being no open account, § 36-2-39, supra, did not authorize attorney fees. With this result, we need not consider other arguments presented on the question of attorney fees.

The judgment of liability having been affirmed, the cause is remanded for further proceedings in connection with the amount of the judgment, as previously specified. Each party is to bear his own costs.

IT IS SO ORDERED.

JOE W. WOOD

Judge

WE CONCUR:

RAMON LOPEZ, J.

MARY C. WALTERS, J.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Wednesday, February 18, 1981

No. 13505

WYNN OIL COMPANY

Petitioner,

vs.

SOUTHERN UNION EXPLORATION COMPANY,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 4168 and 4262 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Tuesday, March 10, 1981

No. 13,505

WYNN OIL COMPANY,

Petitioner,

vs.

SOUTHERN UNION EXPLORATION COMPANY,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

This matter coming on for consideration by the Court upon Motion of Petitioner for Rehearing, and the Court having considered said motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that Motion of Petitioner for rehearing be and the same is hereby granted.

ATTEST: A TRUE COPY

Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Wednesday, July 22, 1981

No. 13,505

WYNN OIL COMPANY,

Petitioner,

vs.

SOUTHERN UNION EXPLORATION COMPANY,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

WHEREAS, it appearing to the Court that an Order was entered by this Court on February 18, 1981, denying petition for writ of certiorari; and that Respondent filed a motion for reconsideration on February 23, 1981 and an Order was entered by this Court on March 10, 1981, granting said Motion for Reconsideration;

NOW, THEREFORE, IT IS ORDERED that the Order entered by this Court on March 10, 1981, granting the motion for reconsideration be and the same is hereby vacated and set aside;

IT IS FURTHER ORDERED that the Motion of Respondent for Reconsideration be and the same is hereby denied.

ATTEST: A TRUE COPY

Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Wednesday, August 26, 1981

No. 13,505

WYNN OIL COMPANY,

Petitioner,

vs.

SOUTHERN UNION EXPLORATION COMPANY,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

This matter coming on for consideration by the Court upon Second Motion for Reconsideration, and the Court having considered said Second Motion for Reconsideration and now being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that Second Motion for Reconsideration be and the same is hereby denied.

ATTEST: A TRUE COPY
Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX F

[SEAL]

STATE OF NEW MEXICO
FIRST JUDICIAL DISTRICT

Chambers of
Bruce E. Kaufman
District Judge
Division IV

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March 19, 1979

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Albuquerque, New Mexico 87103

Re: Southern Union Supply Co., et al. v. Wynn Exploration Co., et al.: Cause No. 51726

Gentlemen:

In arriving at the court's opinion on the issues in this case I have considered the pleadings and responses as amended, the evidence received orally at trial and the exhibits and documents properly received in evidence, the arguments on the law and legal memoranda submitted by counsel as well as independent research attempted by my-

self on issues raised during the proceedings. As may be apparent by virtue of the delay and (sic) the rendering of this decision, I have to some extent sought to review my own notes and materials gathered during the trial to the extent that it is possible to do so with the interruptions normally attended to in day to day routines. I am satisfied that I have as thoroughly reviewed the materials pertinent to this decision as is possible and therefore render this opinion directed toward ultimate findings and conclusions and judgment in this cause.

After all of the research and arguments touching upon technical matters which have been received and reading many materials, some cited, some not cited, I must return to a matter of original impression that after all is said and done the case is one basically of contract law principles.

Having considered all of the testimony in light of legal far afield (sic) in my own independent research, I ultimately return to the conclusion and judgment that there is virtually no issue of law raised in this case that could not have been decided by reference to a contract horn book. It is true as was argued, that to a large extent the matters herein must be determined by believability or credibility of testimony considered in the entire context of evidence, conversations and exchanges which took place, as well as customs and practices of the industry and other considerations which arise in day to day commerce in the oil and gas industry, bear on the conclusion reached (sic).

Initially, my conclusions are that negotiations which did occur between Haseltine and Wynn were largely predicated upon knowledge held by one individual of another but were nonetheless reduced to formal writings and indeed informal understandings on the basic (sic) of corporate undertakings. This is to say, that while Wynn claims certain things were done by him principally in reliance of Haseltine and Haseltine indicates that he was dealing with Wynn (the

individual) that nonetheless both in their original writings (and later corrected contracts) each of the parties was dealing with the other on a business format or corporate basis.

Certain of the errors or clerical misprisions (which ever one chooses to regard them as) were nonetheless, it seems to me, rather routinely accepted and corrected in formal written form or at least by the conduct of the parties subsequently, and to that extent ratified in reliance upon what appeared to me, well understood terms and conditions sought to be incorporated in the original agreement and modified to some extent thereafter.

The letter of September 8th, acted upon apparently on the 4th of October, 1975, by Wynn and the operating agreement, the receipt of which was in dispute but which was in any event signed, appeared to me to predicate the basis for the agreement and must be the documents from whence flowed the legal consequence without substantial variance.

It seems clear to me viewing with the benefit of hindsight and perspective perhaps not afforded the parties, the initial basis could have been better set forth in greater detail and that notices issuing and responses thereto should have been done in a more orderly fashion. However, I recognize that in the day to day course of business, many of these things are not viewed as crucial to the on-going flow of business and not particularly noted, therefore subsequent conduct of the parties in reliance upon their prior judgment becomes of increasing import as to the manner in which the parties did view actions taken, affirmed or ratified.

With the exception of the Supco Number One Well upon which the notice was clearly inappropriate under the terms of the original agreement or understanding, I believe that the evidence must weigh on behalf of the plaintiff to the extent that Wynn was in fact a willing participant in each of the drilling operations.

Whether or not one views the agreement as having created a joint venture, there was certainly the *opportunity* for certain mutual exercise of control or taking over of operations at one phase or another. This Wynn apparently never did, and it seems by virtue of the evidence produced at trial, he did attempt to belatedly document expressions of interest in becoming operating partner. In other words, Wynn had the opportunity to exercise certain prerogatives which in fact it is not documented that he did so employ.

Defendant Wynn Companys' (sic) did pursue the matters and all outward communications reflected continuing participation and interest upon the part of the Wynn defendants.

I cannot find any evidence before me, that plaintiff's (sic) Southern Union Exploration did in fact breach any right of Wynn either in initially commencing drilling or to take (sic) over operation of any of the ventures pursued. Other than the obvious overlooking of the Supco One notice the evidence is entirely to the contrary.

Because of the nature and substance of the agreement which I previously indicated I viewed as a contract matter between consenting parties, in effect as corporate partners, I do believe that either of the parties was entitled upon appropriate notice and proper form to an accounting one from the other. Again, it would seem that the accounting practices initially applied in this matter were not destined to clearly reflect the day to day transactions. By the time this matter came to trial it is apparent that this had been corrected and that the reporting aspects of daily operations together with a recapitulation type statement are readily available. I therefore believe that it is appropriate that Wynn have an accounting showing precisely what the totality of his involvement and obligations was and is as of the current time. In effect, it may well be that the evidence produced at trial from the various representatives of each of the parties, and particularly the fiscal officer of the

defendant Southern Union Company, has been provided. If that is not sufficient, however, I would direct that the information provided as to the total picture of the financial obligations of the parties be rendered in a simplistic letter form stating what the commitment and balances of the parties are with regard to their respective interests and have the underlying vouchering material available for inspection by Wynn at a mutually agreed time and place.

With respect to the claims that notwithstanding notice to Wynn and his chance to participate that the Southern Union Exploration's work was done on a basis that was either negligent, grossly negligent or otherwise improper, this aspect of the case took far more time in receipt that I am prepared to give it in the rendition of an opinion. The testimony received on behalf of both parties was impressive. One cannot certainly overlook the testimony received from the Wynn witnesses any more than one can lightly discard the testimony of the company employees and people in the industry that were produced by Southern Union.

After all that is said and done this is still a court of law to be governed by not only the credibility of the evidence but the propriety of actions occurring at past times based on information then available.

I cannot find that the explorations, while they might otherwise be done today, were in fact so negligent, grossly negligent or otherwise improper so as to afford either a defense to or an action by the Wynn defendants against Southern Union Exploration. Whether it was a neglect of research in advance the obtaining of information or the manner and form of the treatments, I must find that no activities so undertaken were so grossly deficient or widely neglectful so as to in any fashion predicate the claims either in defense or counterclaim on behalf of Wynn.

The testimony on the issue of the FPC and "intra" state marketing or "inter-state" marketing while positing interesting theories which might or could have underlain the considerations of Southern Union in seeking to formulate and operate this agreement, are to me as produced in evidence no more than that simply intriguing theories which are factually unsupported in evidence received by the court.

I have not overlooked the fact that parent company of the plaintiff is in fact a public utility and that the standards applicable there are indeed to some extent different than those which might apply to a purely public but non utility type gas and petroleum exploration or marketing company. I find that none of the standards urged by defendant Wynn affects the manner or course of their conduct or legal consequences flowing therefrom.

I also indicate that whether the standard as observed above was one of negligence, reckless professional disregard, or misconduct or gross negligence that the defendant Southern Union has not breached any of the standards which I find to be here applicable.

With the foregoing recitations, it is not necessary to consider the application for recession (sic) for false representations as prayed and that application of the plaintiff will be denied. The balance of the claims by the Wynn interest including the call on the gas and marketing the gas which are intertwined with the other contractual theories of counterdefendant, I find are not supported by sufficient evidence to warrant further consideration and will dismiss them denying the relief prayed.

While there is a clear conflict as to the exchanges orally, the weight of the evidence seems to me clearly to be on the side of the plaintiff, Southern Union Exploration and I cannot find any overriding testimony to the degree necessary to negate the clear agreement which I have recited above, therefore, the claim for relief on that basis by the counterclaimant is respectfully denied.

With respect to the various discussions of intermingled corporate purpose "overshadowing" purposes or the alter ego theories, these are again intertwined with both the contractual theory of the case, alleged misrepresentations or inactions and acts said to have been neglectful or imprudently done. As has often been said corporations act only through their individual employees, officers and agents. While the counterclaim pleadings do not go as far as to claim fraud they do claim improper activity to the extent that it would have to be established by clear and convincing evidence in my view, to so sustain such a cause of action. I can find no such proof accordingly, the claim for alleged corporate overshadowing is denied.

Having found that the basic action herein is a contractual one which was in fact breached by the legal contracts, I will award judgment based on the foregoing recitations against the principle (sic) corporate defendants as named in the amended pleadings. I have also above stated, that the nature of the relationship was one of between (sic) agreeing partners of corporate character much in the nature of a joint-venture undertaken. Accordingly, I cannot find that it was an open account but can find that interest should be assessed by virtue of the apparent wilful delay in the acknowledgment of a legitimate debt passed (sic) due. The provision for collection of attorney fees, however, I cannot accede to because of the recitations as just made. I will therefore assess judgment in the sum of $1,879,791.22 as adduced by the proof of the fiscal officer during his testimony, will deny the application for attorneys fees but will award costs on behalf of the plaintiff, Southern Union Supply Company. The judgment shall lie against both Wynn Exploration and Wynn Oil Companies but not against R. C. Wynn individually. All counterclaims as submitted and not otherwise specifically enumerated in the foregoing recitations are respectfully denied and the defendant Wynn interests shall take nothing by their counterclaims.

Parties requiring further clarification of the foregoing recitation may address themselves specifically at the court for such clarification with copies of the inquiry noted to opposing counsel.

Thank you for your consideration and patience.

Very truly yours,

BRUCE E. KAUFMAN

Bruce E. Kaufman
District Judge

BEK :maf

APPENDIX G

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO COUNTY OF SANTA FE

No. 51726 Consolidated SF 77-1263
Filed on 5-11-79

SOUTHERN UNION SUPPLY COMPANY,
a Delaware corporation,
Plaintiff,

vs.

WYNN EXPLORATION COMPANY, INC.,
et al.,
defendants,

WYNN EXPLORATION COMPANY, INC.,
Plaintiff,

vs.

SOUTHERN UNION COMPANY, SOUTHERN
UNION SUPPLY COMPANY and SUPRON
ENERGY CORPORATION, formerly
Southern Union Production Company,
Defendants.

DECISION OF THE COURT

The Court, having heard the evidence and the arguments of counsel, and having considered the Requested Findings of Fact and Conclusions of Law submitted by Southern Union Supply Company, now known as Southern Union Exploration Company, Southern Union Company, Wynn Exploration Company, Inc., Wynn Oil Company and R. C. Wynn, now renders the following decision:

FINDINGS OF FACT

1. Southern Union Supply Company, the Plaintiff in this case, has changed its name to Southern Union Exploration Company and hereinafter will be referred to as Southern Union Exploration Company. Southern Union Exploration Company is a corporation duly organized and existing under the laws of the State of Delaware and is authorized to do business in the State of New Mexico and has a valid and separate corporate existence from that of Southern Union Company.

2. Wynn Oil Company and Wynn Exploration Company are corporations organized under the laws of the State of Texas. R. C. Wynn, a resident of Santa Fe County, New Mexico, is the sole stockholder of Wynn Oil Company and Wynn Exploration Company. The registered office and registered agent of each corporation is the Corporation Company, P.O. Box 787, Santa Fe, New Mexico 87501. Wynn Oil Company and Wynn Exploration Company, Inc. will hereinafter be referred to jointly as Wynn.

3. Southern Union Exploration Company and Wynn entered into an agreement to explore and develop certain oil and gas leases in Lea County, New Mexico, such leases hereinafter referred to as the Gallagher Prospect and being located on the following described property:

> Sections Eight (8) and Seventeen (17)
> and the East One Half (E ½) of Section
> Eighteen (18), Township Seventeen South
> (T-17-S), Range Thirty Four East
> (R-34-E), Lea County, New Mexico.

4. The letter agreement of September 8, 1975, (Plaintiff's Exhibit No. 1), the Operating Agreement (Plaintiff's Exhibit No. 3), and the letter agreement of November 18, 1975 (Plaintiff's Exhibit No. 4) were all made and entered into in Dallas, Texas, and constitute the entire agreement

between Southern Union Exploration Company and Wynn as to the Gallagher Prospect.

5. Wynn Oil Company was a party to all agreements with Southern Union Exploration Company regarding the Gallagher Prospect. Wynn Oil Company assigned its rights in the Gallagher Prospect to Wynn Exploration Company by the letter agreement of November 18, 1975, but the letter agreement was not intended by the parties to release Wynn Oil Company from its obligations to Southern Union Exploration Company regarding the Gallagher Prospect.

6. The Operating Agreement was intended by Southern Union Exploration Company and Wynn to apply to all wells drilled on the Gallagher Prospect.

7. Wynn agreed to the drilling and completion of all wells on the Gallagher Prospect except the Supco State No. 1 well.

8. In accordance with the agreements of the parties, Southern Union Exploration Company drilled, completed or operated the following wells on the Gallagher Prospect: Gallagher State 8-2, Gallagher State 8-3, Lea-C-State; Pennzoil State No. 1; Supco State No. 1 and Supco State No. 2.

9. Southern Union Exploration Company, in drilling, completing and operating the wells on the Gallagher Prospect (to which Wynn consented), incurred expenses in the total amount of $3,130,432.02 through October 31, 1978, all of which expenses were reasonable, necessary and proper for the prudent development of the property.

10. In accordance with the agreements between Wynn and Southern Union Exploration Company, Wynn is obligated to pay one-half of all expenses incurred in the drilling, completion and operation of the wells to which Wynn was a consenting party.

11. Although statements and invoices for charges incurred by Southern Union Exploration Company in the drilling, completion and operation of the wells were sent to Wynn, Wynn has failed and refused to pay any of its share of such expense.

12. Wynn's share of the expenses incurred by Southern Union Exploration Company in the drilling, completion and operation of the wells to which Wynn was a consenting party is $1,565,216.01 through October 31, 1978.

13. In accordance with the Operating Agreement, Southern Union Exploration Company is entitled to interest at the rate of 10% per annum of Wynn's unpaid share of the expenses, such interest amounting to $279,707.78 through October 31, 1978.

14. There was no agreement between Southern Union Exploration Company and Wynn to list, publish, give evidence to others or show Wynn as co-owner or co-operator of the wells.

15. Wynn did not suffer any damages as a result of not being listed or shown as a co-owner or co-operator of the wells.

16. Southern Union Exploration Company's use of the Keil process in completing the Pennzoil State No. 1 well did not constitute either ordinary or gross negligence.

17. Southern Union Exploration Company drilled, completed and operated the wells in a good, prudent and workmanlike manner and was not guilty of any ordinary or gross negligence in the drilling, completion and operation of the wells.

18. Wynn did not suffer any damages as a result of Southern Union Exploration Company's drilling, completion and operation of the wells.

19. Southern Union Exploration Company did not breach any fiduciary duties, contractual duties or duties of ordinary care to Wynn with respect to the drilling, completion, operation or marketing of production from the wells.

20. Southern Union Exploration Company was not negligent and did not act in bad faith or in a reckless or wanton manner in filing or processing an application with the Federal Power Commission to market the gas from the wells in interstate commerce or in not marketing the gas pending approval of such application.

21. Southern Union Exploration Company has prudently and timely marketed the production from the wells.

22. Wynn did not suffer any damages as a result of Southern Union Exploration Company's filing an application with the Federal Power Commission to market the gas from the wells in interstate commerce or as a result of Southern Union Exploration Company's not marketing the gas pending approval of such application.

23. The agreements between Southern Union Exploration Company and Wynn did not contemplate, nor were they intended to extend to properties other than those specifically described. Southern Union Exploration Company and Wynn did not enter into any other agreements to explore or develop any other oil and gas reserves. No fiduciary relationship existed between Southern Union Exploration Company and Wynn by virtue of their agreements or activities.

24. Wynn never elected to take over the drilling, completion or operation of any of the wells.

25. Southern Union Exploration Company and Wynn did not enter into any agreement to allow Wynn to operate the Gallagher State 8-2.

26. The information obtained by Southern Union Exploration Company in drilling, completing and operating the

wells was provided or made available to Wynn or was equally available to Wynn as to Southern Union Exploration Company.

27. Southern Union Company and Southern Union Exploration Company have not allowed their corporate purposes to overshadow the agreement between Southern Union Exploration Company and Wynn.

28. Wynn did not suffer any damages as a result of any acts or omissions of either Southern Union Company or Southern Union Exploration Company in any way related to the events or transactions involved in this case.

29. Southern Union Company and Supron Energy Corporation did not intentionally or otherwise interfere with Southern Union Exploration Company or its agreement with Wynn.

30. Southern Union Company and Southern Union Exploration Company did not combine, contract or conspire to shut in the wells and did not restrict trade and did not limit or control the quantity of oil and gas produced from the wells.

31. Southern Union Exploration Company did not make any misrepresentations or commit any fraud upon Wynn during or after negotiations concerning the Gallagher Prospect.

32. Southern Union Exploration Company performed all of its obligations to Wynn as required by the agreements relating to the Gallagher Prospect.

33. Southern Union Exploration Company has provided an accounting to Wynn as required by the Operating Agreement.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court concludes as a matter of law as follows:

1. This Court has jurisdiction over the parties and subject matter of this action.

2. The doctrine of forum non conveniens alleged by the Wynn defendants is not applicable to the circumstances of this action.

3. Wynn was in breach of the agreements with Southern Union Exploration Company in failing to pay its share of the expenses incurred by Southern Union Exploration Company in drilling, completing and operating the wells.

4. Southern Union Exploration Company is not the alter ego of Southern Union Company.

5. The Operating Agreement applies to all wells drilled on the Gallagher Prospect.

6. Southern Union Exploration Company, as operator of the wells, has no liability to Wynn, as non-operator, for losses sustained, or liabilities incurred, except such as result from gross negligence. The standard of care of gross negligence as applied to the actions of the operator in this case is not against public policy and is valid and enforceable.

7. Southern Union Exploration Company has a valid and enforceable call on all natural gas produced from the wells as provided in the Operating Agreement. The call on gas is not vague, ambiguous or indefinite or against public policy.

8. Southern Union Company and Southern Union Exploration Company did not violate any provisions of the laws of the State of New Mexico relating to antitrust, monopolies or restraints of trade in connection with the drilling, completion or operation of the wells or marketing of production from the wells.

9. The evidence presented by Southern Union Exploration Company in this action constitutes an adequate and

proper accounting to Wynn of the income and expenses relating to the wells through October 31, 1978.

10. Wynn did not prove by a preponderance of the evidence any of its affirmative defenses to Southern Union Exploration Company's Third Amended Complaint.

11. Wynn failed to prove by a preponderance of the evidence any of the material allegations contained in its Complaint and Counterclaim against Southern Union Exploration Company, Southern Union Company and Supron Energy Corporation, and accordingly, the causes of action contained therein should be dismissed with prejudice.

12. Southern Union Exploration Company has a valid, subsisting, first and preferred operator's lien under the Operating Agreement as to Wynn's interest in the real and personal property and the proceeds from the wells located on the Gallagher Prospect.

13. Southern Union Exploration Company is entitled to judgment against Wynn Exploration Company and Wynn Oil Company in the amount of $1,879,791.22, plus interest on such sum from November 1, 1978, at the rate of 10% per annum until paid in full, foreclosure of its operator's lien and costs of this action.

All Requested Findings of Fact and Conclusions of Law of the Parties inconsistent with those found or which are not adopted by the Court are denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BRUCE E. KAUFMAN

District Judge

APPENDIX H

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO COUNTY OF SANTA FE

No. 51726 Consolidated SF 77-1263
Filed on 5-11-79

SOUTHERN UNION SUPPLY COMPANY,
a Delaware corporation,
Plaintiff,

vs.

WYNN EXPLORATION COMPANY, INC.,
et al.,
Defendants,

WYNN EXPLORATION COMPANY, INC.,
Plaintiff,

vs.

SOUTHERN UNION COMPANY, SOUTHERN UNION SUPPLY COMPANY and SUPRON ENERGY CORPORATION, formerly Southern Union Production Company,
Defendants.

JUDGMENT

This cause having come on for trial before the Court sitting without a jury, and the Court having heard the testimony of the witnesses and having considered all of the evidence submitted at the trial and having considered

the arguments and briefs submitted by counsel and having made its decision herein and entered its Findings of Fact and Conclusions of Law.

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, be, and it hereby is, granted judgment against the Defendants, Wynn Exploration Company, Inc. and Wynn Oil Company, in the amount of $1,879,791.22, plus interest on such sum from November 1, 1978, until entry of this judgment, at the rate of 10% per annum, and thereafter interest on the judgment at the rate of 10% per annum until paid in full.

2. That the Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, be and hereby is, awarded its costs against the Defendants, Wynn Exploration Company, Inc. and Wynn Oil Company.

3. That the Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, be, and it hereby is, adjudged and declared to have a valid, subsisting, first and preferred operator's lien under the Operating Agreement upon, against and applicable to any and all interest of the Defendants, Wynn Exploration Company, Inc. and Wynn Oil Company, in the following described land located in Lea County, New Mexico:

> Sections Eight (8) and Seventeen (17) and the East One Half (E ½) of Section Eighteen (18), Township Seventeen South (T-17-S), Range Thirty-Four East (R-34-E), Lea County, New Mexico,

and in all rights, properties, assets and interests appurtenant to such land, including, but not limited to, any and all interest of such Defendants in all oil, gas and other minerals in, on and under such land, and in all oil, gas and other minerals produced from such land and in the value and proceeds thereof, and in all wells, materials, equipment,

fixtures and personal property located on or acquired for use on such land, such lien to secure the payment of all sums awarded to Plaintiff under this judgment, including interest and the costs of this action.

4. That the said operator's lien awarded to Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, be, and it hereby is, ordered foreclosed and the above described interest of the Defendants, Wynn Exploration Company, Inc. and Wynn Oil Company, be, and it hereby is, ordered sold in accordance with the law of the State of New Mexico to satisfy this judgment and all sums due under it, and the Defendants, Wynn Exploration Company, Inc. and Wynn Oil Company, be, and they hereby are, forever foreclosed, barred and estopped from having or claiming to have any right, title, interest, or lien superior to the lien of Plaintiff in and to the above described property.

5. That Sumner G. Buell be, and he hereby is, appointed as a Special Master by the Court to sell the interest of the Defendants, Wynn Exploration Company, Inc., and Wynn Oil Company, in and to the said above described property. The sale shall take place on the 20th day of June, 1979, at 10:00 a.m. (or on such later date as may be ordered by this Court) at the Lea County Courthouse in Lea County, Lovington, New Mexico. The Special Master shall, upon confirmation of the sale by this Court, issue a Special Master's Deed and Bill of Sale to the purchaser of the interest ordered sold hereunder.

6. The foreclosure and sale shall be in accordance with the provisions of the law of New Mexico relating to such matters, to-wit: Section 39-5-1 through 39-5-23, N.M.S.A. 1978, inclusive, and the parties to this action may bid and purchase at such sale. The Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration

Company, may bid all, or any portion of, the judgment awarded herein at the sale.

7. That the proceeds of said sale be applied first to the expenses of the sale and then to the amounts due Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, such sums to be applied first to accrued interest and then to principal. If the proceeds of the sale are insufficient to satisfy said sums due to the Plaintiff, then this judgment shall be effective against the Defendants, Wynn Exploration Company, Inc. and Wynn Oil Company, with respect to the amount of any such deficiency and execution shall issue against the assets of said Defendants for such deficiency.

8. That all actions and all counterclaims and complaints of the Defendant, Wynn Exploration Company, Inc., against the Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, and against Supron Energy Corporation, formerly Southern Union Production Company, and Southern Union Company be, and they hereby are, dismissed with prejudice.

9. That Supron Energy Corporation, formerly Southern Union Production Company and Southern Union Company, be, and they hereby are, awarded their costs against the Defendant, Wynn Exploration Company, Inc.

10. That the application for attorneys' fees by the Plaintiff, Southern Union Supply Company, now known as Southern Union Exploration Company, be, and the same hereby is, denied.

Dated this 11th day of May, 1979.

BRUCE E. KAUFMAN

District Judge

APPENDIX I

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 51726

SOUTHERN UNION SUPPLY COMPANY,
a Delaware corporation,
Plaintiff,

vs.

WYNN EXPLORATION CO., INC.;
WYNN OIL COMPANY; and Does
I through XX, inclusive,
Defendants.

THIRD AMENDED COMPLAINT

Comes now the plaintiff, Southern Union Supply Company, by and through its attorneys, Strasburger and Price, and Montgomery, Andrews & Hannahs, and for its Third Amended Complaint against the defendants states:

FIRST CAUSE OF ACTION
(BREACH OF WRITTEN AGREEMENT)

1. At all times material hereto, plaintiff Southern Union Supply Company ("SUSCO") was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is authorized to do business and is doing business in the State of New Mexico.

2. Defendant R. C. Wynn organized or caused to be organized defendant corporations Wynn Exploration Co., Inc. ("Wynn Exploration") and Wynn Oil Company ("Wynn Oil"), under the laws of the State of Texas for the purpose of engaging in the oil business; defendant R. C. Wynn is the sole stockholder of both defendant corporations and

has held the office of President of each from the dates of their respective incorporations until the present time.

Defendant R. C. Wynn is, and has been, conducting, managing and controlling the affairs of said corporations since their respective incorporations, as though each were his own business, and he has used said defendant corporations for the purpose of defrauding plaintiff as hereinafter set forth. Defendant R. C. Wynn has been doing business and presently is doing business through Wynn Exploration and Wynn Oil in New Mexico.

3. Defendant Wynn Oil was organized by defendant R. C. Wynn as his alter ego, and is authorized to do business and is doing business in the State of New Mexico. Defendant Wynn Oil has never had, and does not now have, any genuine or separate corporate existence, but has been used and exists for the sole purpose of permitting defendant R. C. Wynn to transact a portion of his business under a corporate guise. If Wynn Oil is not the alter ego of R. C. Wynn, then alternatively, Wynn Oil is directly liable for the damages set forth herein.

4. Defendant Wynn Exploration was organized by R. C. Wynn as his alter ego and is authorized to do business and is doing business in the State of New Mexico. Defendant Wynn Exploration has never had, and does not now have any genuine or separate corporate existence, but has been used and exists for the sole purpose of permitting R. C. Wynn to transact a portion of his individual business under a corporate guise. If Wynn Exploration is not the alter ego of R. C. Wynn, then alternatively, Wynn Exploration is directly liable for the damages set forth herein.

5. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants named herein as Does I through XX, inclusive, are unknown to plaintiff who therefore sues said defendants by such fictitious names. When said true names and capacities have

been ascertained, plaintiff will amend its complaint accordingly. Plaintiff is informed and believes and on such information and belief alleges that such of the defendants named herein as a Doe is responsible for the obligations sued upon herein.

6. On or about October 4, 1975, plaintiff SUSCO and defendant R. C. Wynn, acting through his alter ego Wynn Oil entered into a letter agreement whereby, among other things, plaintiff SUSCO and defendant R. C. Wynn through Wynn Oil agreed to explore certain oil and gas leases indentified therein under certain terms and conditions which were to be detailed in a certain written Operating Agreement, a true and correct copy of said written letter agreement is attached hereto, marked Exhibit "A" and incorporated herein by this reference as though set forth in full.

7. Under date of September 15, 1975, plaintiff SUSCO and defendant R. C. Wynn acting through his alter ego Wynn Oil entered into a written Operating Agreement, referred to in the letter agreement which is Exhibit "A" hereto, whereby, among other things, plaintiff SUSCO, as operator, and defendant R. C. Wynn through Wynn Oil agreed to explore and develop certain oil and gas leases located in Lea County, State of New Mexico. The aforementioned written Operating Agreement provides that the interest of defendant R. C. Wynn through Wynn Oil pursuant to the agreement was 75%, and all costs and liabilities incurred in the exploration and development would be paid according to such interest. The aforementioned written Operating Agreement also provides that defendant R. C. Wynn through Wynn Oil would make all payments for said costs within 15 days of billing, and that if payments were not so made, the unpaid balance would bear interest at 10% or the maximum rate allowed by law, whichever was less. A true and correct copy of said written Operating Agree-

ment is attached hereto, marked Exhibit "B" and incorporated herein by this reference as though set forth in full.

8. On or about November 24, 1975, the aforementioned written Operating Agreement was amended in writing to provide that the interest of defendant R. C. Wynn through Wynn Oil pursuant to the Operating Agreement was 50%, and all costs and liabilities incurred in the exploration and development would be paid according to such interest. In addition, the written amendment further provided that defendant R. C. Wynn would substitute his alter ego Wynn Exploration in place of his alter ego Wynn Oil in the written Operating Agreement. A true and correct copy of said written amendment is attached hereto, marked Exhibit "C" and incorporated herein by this reference as though set forth in full.

9. Pursuant to the aforementioned written Operating Agreement, plaintiff SUSCO commenced exploration and development of those certain oil and gas leases and, under and by virtue of the terms of the aforementioned written Operating Agreement and amendment, sums totaling $1,275,820.30, became due and payable from defendants and each of them to plaintiff SUSCO for the period commencing November 1, 1975 and ending December 31, 1976, including interest as provided in said written Operating Agreement, and defendants have been timely billed for such amounts. Certain operating and late charges may have been incurred by plaintiff for the period commencing November 1, 1975 and ending December 31, 1976, which charges are not yet known to plaintiff but for which defendants and each of them shall be obligated as provided in said Operating Agreement and amendment.

10. Plaintiff has duly performed all the conditions of said written Operating Agreement as amended on its part to be performed.

11. Defendants and each of them have breached said written Operating Agreement and written amendment by

failing and refusing to pay the amounts set forth above required to be paid by them although demand has been made therefor by plaintiff SUSCO.

12. By reason of defendants' breach, plaintiff SUSCO has been damaged in the sum of $1,275,820.30 through December 31, 1976, plus such late and operating charges incurred by plaintiff SUSCO but as yet unknown to it. Plaintiff SUSCO is continuing the exploration and development of those certain oil and gas leases and continues to incur costs and expenses in connection with said exploration and development, and plaintiff shall be further damaged in an amount equal to 50% of such costs and expenses and interest on the unpaid principal sums as provided in the written Operating Agreement as amended.

13. Plaintiff SUSCO is informed and believes and, upon such information and belief, alleges that the refusal by defendants to make the required payments was and is in bad faith and not because of any legitimate dispute between plaintiff SUSCO and defendants. By reason of such bad faith, plaintiff SUSCO is entitled to exemplary and punitive damages from defendants and each of them in the sum of $1,000,000.00.

• • •

WHEREFORE, plaintiff SUSCO prays for judgment against the defendants, R. C. Wynn, and alternatively Wynn Oil and Wynn Exploration, and each of them, as follows:

FIRST CAUSE OF ACTION

1. For the sum of $1,275,820.30 plus interest on the amounts due as provided in said written Operating Agreement, and such operating and late charges as plaintiff may hereafter become aware;

2. For an amount equal to 50% of costs and expenses incurred by SUSCO in the exploration and development of the subject leases for the period commencing January 1, 1977 and ending concurrent with the conclusion of the

exploration and development of the leases covered by the written Operating Agreement plus interest on unpaid amounts as provided by the written Operating Agreement; and

3. For exemplary and punitive damages in the sum of $1,000,000.00.

• • •

STRASBURGER and PRICE
MONTGOMERY, ANDREWS &
HANNAHS

By WALTER J. MELENDRES

Walter J. Melendres
P.O. Box 2307
Santa Fe, New Mexico 87501

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Third Amended Complaint was mailed to James E. Sperling, Esq., 800 Public Service Building, P.O. Box 2168, Albuquerque, New Mexico, 87103, and to Campbell, Bingaman and Black, P.A., P.O. Box 2208, Santa Fe, New Mexico, 87501, on this 14th day of April, 1978.

WALTER J. MELENDRES

SOUTHERN UNION SUPPLY COMPANY
FIDELITY UNION TOWER
DALLAS, TEXAS 75201

November 18, 1975

Wynn Exploration Company
Suite 1808, Campbell Centre
Dallas, Texas 75206

Attention: Mr. R. C. Wynn

Re: Gallagher Prospect, Section 8, 17 and East Half of Section 18, T-17-S, R-34-E, Lea County, New Mexico

Gentlemen:

Reference is made to our letter to you dated September 8, 1975, to which was attached an operating agreement and also reflected the agreement between Wynn Oil Company and Southern Union Supply Company. I have recently been informed that you have agreed to assume 50% of the cost and obligations as well as the rights and benefits to be earned and acquired in connection with the subject prospect and further that you were desirous of the change in name of your Company from Wynn Oil Company to Wynn Exploration Company.

The purpose of this letter is to amend our agreement dated September 8, 1975, herein above referred to, to the extent that Wynn Exploration Company and Southern Union Supply Company each agree to assume 50% of the cost and obligations and accordingly be entitled to 50% of the rights and benefits to be earned and/or acquired as results of our joint operation hereunder.

It is understood and agreed that the provisions set forth in our letter agreement dated September 8, 1975, shall remain in full force and effect in all of its terms and provisions except as herein specifically amended.

EXHIBIT "C"

In the event the above remarks correctly state the terms agreed upon, please indicate your concurrence by executing and returning a copy of this letter in the space provided at your earliest convenience since the well is presently on location and drilling.

Yours truly,

SOUTHERN UNION SUPPLY COMPANY

By ORAN L. HAZELTINE

Oran L. Hazeltine —
Vice President

AGREED TO AND ACCEPTED THIS 24th day of November, 1975.

WYNN EXPLORATION COMPANY

By R. C. WYNN

R. C. Wynn — *President*

EXHIBIT "C"

APPENDIX J

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 51726 Consolidated SF 77-1263

SOUTHERN UNION SUPPLY COMPANY,
a Delaware corporation,
Plaintiff,

vs.

WYNN EXPLORATION CO., INC.
et al.,
Defendants,

WYNN EXPLORATION CO., INC.,
Plaintiff,

vs.

SOUTHERN UNION COMPANY, SOUTHERN UNION SUPPLY COMPANY, and SUPRON ENERGY CORPORATION, formerly Southern Union Production Company,
Defendants.

ANSWER OF DEFENDANTS R. C. WYNN, WYNN EXPLORATION COMPANY, INC. AND WYNN OIL COMPANY TO THIRD AMENDED COMPLAINT

FIRST DEFENSE

The Complaint fails to state a claim as against these Defendants upon which relief can be granted and it should, therefore, be dismissed.

SECOND DEFENSE

With regard to the specific allegations of the Third Amended Complaint, Defendants state:

RESPONSE TO FIRST CAUSE OF ACTION

1. Defendants admit the allegations of Paragraph 1 of the First Cause of Action.

2. With respect to the allegations of Paragraph 2 of the First Cause of Action, Defendants admit R. C. Wynn caused to be organized Defendant corporations Wynn Exploration Company, Inc. and Wynn Oil Company under the laws of the State of Texas for the purpose of engaging in the oil business, and that Defendant Wynn is the sole stockholder and President of both corporations. Defendants deny the remaining allegations of Paragraph 2.

3. With respect to the allegations of Paragraphs 3 and 4 of the Third Amended Complaint, Defendants admit that Defendant Wynn Oil and Defendant Wynn Exploration were organized by Defendant Wynn and are authorized to do business and doing business in the State of New Mexico. Defendants deny the remaining allegations of Paragraphs 3 and 4.

4. The allegations of Paragraph 5 of the First Cause of Action are not addressed to these Defendants and therefore no response is required. Defendants affirmatively state, however, that to their knowledge there are no John Does, as Wynn Exploration Company, Inc. alone holds 50% working interest in the properties which are the subject matter of this action, and that Defendant, Wynn Exploration Company, Inc., is solely responsible, if at all, for obligations sued upon herein, which responsibility is specifically denied.

5. Defendants deny the allegations of Paragraph 6 of the First Cause of Action insofar as same allege that Defen-

dant Wynn Oil Company was a party in interest to the Agreement (Exhibit "A" and "B" to Plaintiff's Complaint), and affirmatively state that although the letter agreement (Exhibit "A" to Plaintiff's Complaint) and the Operating Agreement (Exhibit "B" to Plaintiff's Complaint) were signed on October 4, 1975, by R. C. Wynn, they were signed on behalf of Wynn Exploration Company, Inc. and Plaintiff mistakenly used the name of Wynn Oil Company. Defendants additionally state that because Plaintiff required immediate signature of said agreements, R. C. Wynn signed said agreements and immediately notified Plaintiff that said agreements were to be corrected to reflect that Wynn Exploration Company, Inc. was the proper and real party to said agreements, and said corrections were in fact made as is evidenced by Exhibit "C" to Plaintiff's Complaint. Defendants deny that Wynn Oil is the alter ego of R. C. Wynn, but admit the remaining allegations of Paragraph 6.

6. With regard to the allegations in Paragraph 7 of the First Cause of Action, Defendants admit the Operating Agreement is dated September 15, 1975, but deny that this is the date that Wynn Exploration Company, Inc. entered into an agreement with Plaintiff. They deny that the Operating Agreement between Plaintiff and Defendant Wynn Exploration Company, Inc. provided for exploration and development of multiple oil and gas leases, and affirmatively state the Operating Agreement between Plaintiff and Defendant, Wynn Exploration Company, Inc., does not cover lands and leases involved in the letter agreement and oral agreement between Plaintiff and Defendant, Wynn Exploration Company, Inc., they admit the Operating Agreement being Exhibit "B" to Plaintiff's Complaint provided that Defendant, Wynn Exploration Company, Inc.'s, interest was 75% and that costs and liabilities incurred in the exploration and development would be paid in accordance with said interest, they deny that the remaining alle-

gations of Paragraph 7 of the First Cause of Action except that they admit Exhibit "B" to Plaintiff's Complaint is a true and correct copy of the Operating Agreement, and they incorporate by reference their answer to Paragraph 6 of the First Cause of Action as the same relates to Defendant, Wynn Exploration Company, Inc. being the real and proper party to said Operating Agreement, as though said answer were set forth in full.

7. With regard to Paragraph 8 of the First Cause of Action, Defendants admit that the Operating Agreement being Exhibit "B" to Plaintiff's Complaint was amended on November 24, 1975, deny that Wynn Oil or R. C. Wynn's interest was 50% or that Wynn Oil Company or R. C. Wynn would pay costs and liabilities incurred in the exploration and development in accordance with said interest. Defendants additionally deny that Wynn Oil or Wynn Exploration is the alter ego of R. C. Wynn, and admit the remaining allegations of Paragraph 8 of the First Cause of Action.

8. With regard to the allegations of Paragraph 9 of the First Cause of Action, Defendants admit that Plaintiff commenced exploration and development of certain oil and gas leases, they deny that $1,275,820.30 became due and payable, and are without information sufficient to for a belief as to the truth of the remaining allegations of Paragraph 8 and therefore deny the same.

9. Defendants deny the allegations of Paragraphs 10 and 11 of the First Cause of Action.

10. With regard to Paragraph 12 of the First Cause of Action, they admit that Plaintiff is continuing exploration and development of certain oil and gas leases, deny that they have breached their agreement and deny that Plaintiff has been damaged in the sum of $1,275,820.30. They are without sufficient information to form a belief as to the remaining allegations of Paragraph 12 and therefore deny the same.

11. Defendants deny the allegations contained in Paragraph 13 of the First Cause of Action.

• • •

MODRALL SPERLING ROEHL
HARRIS & SISK

By ARTHUR D. MELENDRES

Arthur D. Melendres
Attorneys for Wynn Oil
Company, Wynn Exploration
Company, Inc. and R. C. Wynn
P. O. Box 2168
800 Public Service Building
Albuquerque, New Mexico 87103
(505) 243-4511

WE HEREBY CERTIFY that a copy of the foregoing pleading was mailed to opposing counsel of record this 15 day of May, 1978.

MODRALL SPERLING ROEHL HARRIS & SISK

By ADM.

J-6

SOUTHERN UNION SUPPLY COMPANY

FIDELITY UNION TOWER
DALLAS, TEXAS 75201

February 13, 1976

Oran L. Haseltine
Vice President
General Manager

Re: Farm-in Agreement, Section 8,
T-17-S, R-34-E, Lea County,
New Mexico

Mr. C. R. Gallagher, Jr., et al
1063 Broadway
Lubbock, Texas 79401

Dear Mr. Gallagher:

Reference is made to the subject Farm-in Agreement between yourself and Southern Union Supply Company, dated September 16, 1975, as amended, insofar as it relates to the W/2 of Section 8.

By separate agreement Southern Union Supply Company entered into a Letter Agreement dated September 8, 1975, with Operating Agreement attached, which was amended by a letter dated November 13, 1975, to reflect the correct reference to Wynn Exploration Company and to revise the participation regarding the operating ownership in connection with the #2 Gallagher State 8 re-entry (and other lands and leases described therein) between Southern Union Supply Company and Wynn Exploration Company.

Even though the well is presently undergoing tests it is obvious that the well will be completed as a commercial producer which entitles us, as operators, to an assignment from you in accordance with Farm-out Agreement above referred to.

To minimize the effort necessary to conform to the agreements this is to certify that the undersigned own and claim

to own, by virtue of the agreements above referred to, the interest stated below and hereby request you to prepare an assignment to us to reflect the following:

PRIOR TO PAYOUT

	Operating Interest
Southern Union Supply Company	50%
Wynn Exploration Company	50%

(Subject to the lessors 1/8 royalty interest and 1/16 overriding royalty interest in favor of C. R. Gallagher, Jr., et al.)

AFTER PAYOUT

	Operating Interest
C. R. Gallagher, Jr., et al	50%
Wynn Exploration Company	25%
Southern Union Supply Company	25%

(Subject only to the lessors 1/8 royalty interest.)

If you are in agreement with the above interest, coupled with this letter of authority, as between Wynn Exploration Company and Southern Union Supply Company, please prepare and forward an appropriate assignment to us for our approval and execution.

Yours truly,

SOUTHERN UNION SUPPLY COMPANY

By: ORAN L. HASELTINE

Oran L. Haseltine — *Vice President*

and

WYNN EXPLORATION COMPANY

By: R. C. WYNN

R. C. Wynn — *President*

APPENDIX "K"

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

No. 13505

Certiorari to the New Mexico Court of Appeals

WYNN OIL COMPANY,

Petitioner,

vs.

SOUTHERN UNION EXPLORATION COMPANY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO
THE NEW MEXICO COURT OF APPEALS**

* * *

III

THE TRIAL COURT AND THE COURT OF APPEALS EACH FOUND WYNN OIL LIABLE ON A DIFFERENT THEORY OF LIABILITY, NEITHER OF WHICH WAS PLED NOR TRIED BELOW BY SOUTHERN UNION AND OF WHICH WYNN OIL DID NOT RECEIVE DUE NOTICE FROM THE PLEADING OR AT THE TRIAL. FURTHER, THE COURT OF APPEALS MADE FINDINGS OF FACT NOT MADE BY THE TRIAL COURT.

The trial court found Wynn Oil was a party to a contract consisting of all three documents and held it liable for breach of the three documents (Finding 5, 10 R. 3639). The Court of Appeals, on the other hand, determined that Wynn Oil was a party to the *First* and *Second Documents*, but not the *Third Document* (Opinion, Exhibit A, p. 6),

yet held Wynn Oil liable under a contract consisting of only the *First* and *Second Documents* for breach of an obligation imposed by the *Third Document,* to which it was not a party — i.e., the obligation to pay 50 percent of all Gallagher Prospect well costs (*id.* p. 2). Neither basis or theory of liability was pled or tried below, and the pleadings did not give Wynn Oil notice of a claim against it on either theory.

The only basis of liability pled against Wynn Oil was Southern Union's claim that it was merely the alter ego of R. C. Wynn (3rd Amend. Complaint, paras. 2, 3, 4, 6, 7 and 8, 10 R. 1809-12). Southern Union did not allege that Wynn Oil was the alter ego of Wynn X, or vice versa, and, as is demonstrated above, Southern Union judicially admitted that Wynn Oil was not a party to the *Third Document,* for the breach of which it sought damages below. Southern Union did not seek damages against either Wynn Oil or Wynn X measured by the obligations imposed by either the *First* or *Second Documents* — i.e., 75 percent of the costs of all Gallagher Prospect wells or 75 percent of the costs of the first well. Rather, it claimed for damages measured by the obligations imposed by the *Third Document* to which, on the one hand, it did not allege Wynn Oil was a party and, on the other, it judicially admitted and affirmatively alleged Wynn Oil was not a party.

Admittedly, Southern Union also pled that, "if Wynn Oil is not the alter ego of R. C. Wynn, then alternatively, Wynn Oil is directly liable for the damages set forth herein" (3rd Amend. Complaint, para. 3, 5 R. 1810). However, this conclusory allegation was not attended by any statement of claim or facts showing that Southern Union was entitled to damages from Wynn Oil as a party to and for breach of a contract formed by all three documents or by the *First* and *Second Document,* or either of them, or on any other theory of liability. Rule 8(a), N.M.R.Civ.P. specifies three essential parts of a claim for relief: (1) venue

allegations, (2) a statement of claim showing the pleader is entitled to the relief, and (3) a demand for specified relief. Southern Union's noted alternative claim is totally deficient as to the second of these parts. It does not allege that Wynn Oil was a party to a contract formed by all three documents, for the breach of which Southern Union sought damages in its complaint. As this Court said in *Cessna Finance Corp. v. Messilla Valley Flying Serv.*, 81 N.M. 10, 462 P.2d 144, 146 (1969):

> Appellant's counterclaim did not allege sufficient facts to warrant relief or necessitate a reply thereto. Rule 8(a), Rules of Civil Procedure . . . Conclusions made by the pleader, do not state a claim or necessitate a reply thereto. . . .

Moreover, Southern Union's pleaded alternative conclusion of liability does not seek to disclaim its admitted allegation that the *Third Document* substituted Wynn X in the place of Wynn Oil as a party to any contract formed by the first two documents or by all three documents, and also substituted the rights and obligations provided in the *Third Document* for those earlier provided in the *First* and *Second Documents*. Accordingly, it did not meet the test stated in *Cessna Finance Corp.*, and Southern Union's complaint only gave notice to Wynn Oil of an alter ego claim against it, which was rejected by the trial court.

Neither did Southern Union try or prove a claim that Wynn Oil was liable to it as a party to a contract formed by all three documents for breach of an obligation imposed and measured by the *Third Document*. At best, it judicially admitted and proved that Wynn X, but not Wynn Oil, was a party to the three document contract and that Wynn Oil had been a party only to the *First* and *Second Documents*, which was not the contract for the breach of which Southern Union sought damages. Since it did not plead, try, or prove a claim that Wynn Oil was liable to it as a party to and for

breach of the final contract comprised of all three documents, the trial court erred in holding Wynn Oil liable to Southern Union on that theory or claim. *Leonard Farms v. Carlsbad Riverside Terrace*, 90 N.M. 34, 559 P.2d 411, 413 (1977); see also *Federal National Mortgage Ass'n v. Rose Realty, Inc.*, 79 N.M. 281, 442 P.2d 593 (1968).

Similarly, the Court of Appeals has erred in holding Wynn Oil liable to Southern Union on a theory or claim not pled, tried or proven below — namely, the theory that Wynn Oil was a party to a contract consisting of the *First* and *Second Documents*, but was liable for breach of the obligations imposed by the *Third Document*, to which that court found Wynn Oil was not party. Since Southern Union's complaint sought damages for breach of an obligation expressly imposed on Wynn X, not Wynn Oil, by the *Third Document*, the Court of Appeals had to find implicitly that Wynn Oil elsewhere agreed to perform that obligation, which was not found by the trial court and, therefore, could not be determined by the Court of Appeals. *Guidry v. Petty Concrete Co.*, 77 N.M. 531, 424 P.2d 806, 808 (1967).

Because an action for the breach of a written contract must be predicated on a meeting of the minds, *Trujillo v. Glen Falls Insurance Co.*, 88 N.M. 279, 540 P.2d 209 (1975), that is accurately reflected by a written instrument, *Cleveland v. Bateman*, 21 N.M. 675, 158 P. 648 (1916), that is still in effect as of the date of the alleged breach, *Keeth Gas Co. v. Jackson Creek Cattle Co.*, 91 N.M. 87, 570 P.2d 918 (1977), the Court of Appeals, in holding Wynn Oil liable on the basis of a contract consisting of the *First* and *Second Documents* standing alone, made three additional implicit fact findings: (1) that as of the date the *Second Document* was executed, there had been a meeting of the minds between R. C. Wynn and Oran Haseltine; (2) that the *First* and *Second Documents*, standing alone, accurately reflected this meeting of the minds, and (3) that as of the

date of the alleged breach, the parties had not abandoned the two document contract. *None* of these facts were found by the trial court. The Court of Appeals was prohibited from doing so under this Court's holding in *Guidry v. Petty Concrete Co., supra,* which held that an appellate court can not determine matters of fact not determined below.

Concerning a meeting of the minds, the trial court implicitly found a meeting of the minds as of the date of execution of the *Third Document,* but manifestly did not find such a meeting of the minds as of the date of execution of the *Second Document,* nor, in light of the evidence summarized at pp. 19-23, *supra,* could it do so. Similarly, the trial court implicitly found that the three documents taken together accurately reflected the true agreement of the parties, but it manifestly did not find that the first two documents standing alone accurately reflected the intentions of any two parties, nor could it have done so on the basis of the evidence. The evidence in the case clearly raised fact issues concerning a meeting of the minds and mistake as to these first two documents that were not determined by the trial court and *could not* be determined by the Court of Appeals.

Assuming *arguendo* that the *First* and *Second Documents* standing alone constituted a contract that accurately reflected a meeting of the minds as of date of execution, and putting aside for the moment the issue of novation, the Court of Appeals, to predicate Wynn Oil's liability on this two-document contract, had to also implicitly find that this two-document contract was still in effect as of the date of the alleged breach. Whether an executory contract has been abandoned by the parties is an issue of fact that may be implied from the facts and circumstances of the case, *Greenway Park Townhomes Condominium Ass'n, Inc. v. Brookfield Municipal Utility District,* 575 S.W.2d 902, 906 (Tex. Civ. App. — Houston [14th Dist.] 1978, *no writ*); *Marsh v. Orville Carr Associates, Inc.,* 433 S.W.2d 928, 931 (Tex. Civ. App. — San Antonio 1968, *writ ref'd n.r.e.*),

including the fact that there has been a substitution of rights and obligations inconsistent with the original contract. *Moser Co. v. Awalt Industrial Properties, Inc.*, 584 S.W.2d 902, 906 (Tex. Civ. App. — Amarillo 1979, no writ). To the extent that the issue of a two-document contract may have been tried, the issue of the abandonment of that contract was also tried. Surely the evidence in the case, including the undisputed facts that Southern Union never billed Wynn Oil in any amount, and that Southern Union never sued Wynn Oil for 75 percent of the drilling costs, at a minimum gave rise to a fact issue whether the parties intended the two-document contract to have any continuing life after execution of the third document. The trial court did not resolve this fact issue; the Court of Appeals impliedly did, in violation of the rule laid down by this Court in *Guidry*.

In sum, the trial court found Wynn Oil liable on the basis of a three document contract. It erred in so doing, because Southern Union never pled or proved that Wynn Oil was a party to this three document contract. The Court of Appeals noted this specific error, and correctly held that Wynn Oil was not a party to the *Third Document*, and hence not a party to the three document contract. The Court of Appeals erred, however, in holding Wynn Oil liable on the basis of the first two documents standing alone, because (1) Southern Union never prayed for recovery on any basis other than that of a three document contract, (2) the parties did not try the case on any basis other than that of a three document contract, (3) the trial court specifically found only one contract, which consisted of all three documents. The sole issue for determination by the Court of Appeals was whether the lower court had erred in finding that Wynn Oil was a party to the three document contract — the only contract pled, tried, and found. Having correctly concluded that Wynn Oil was not a party to this contract, the Court of Appeals should have reversed the judgment against it.

• • •

THE UNDERSIGNED HEREBY CERTIFIES THAT ON FEBRUARY 2, 1981, HE CAUSED A COPY OF THE FOREGOING PLEADING TO BE MAILED OR HAND-DELIVERED TO ALL COUNSEL OF RECORD.

Charles D. Olmsted

APPENDIX "L"

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

No. 13505

Certiorari to the New Mexico Court of Appeals

WYNN OIL COMPANY,

Petitioner,

vs.

SOUTHERN UNION EXPLORATION COMPANY,

Respondent.

MOTION FOR REHEARING

Comes now Wynn Oil Company, Petitioner in the above styled and numbered cause, and files this Motion for Rehearing of this Court's decision denying its Petition for Writ of Certiorari, and would respectfully show the Court as follows:

I

In denying Wynn Oil Company's Petition for Writ of Certiorari, this Honorable Court has overlooked or misapprehended the following points of law and fact:

(1) The Court of Appeals violated this Court's controlling decision in *Matter of One Cessna Aircraft, Etc.*, 90 N.M. 40, 559 P.2d 417 (1977), by ruling that an averment of a material matter made in the complaint, admitted in the answer, and repeated by the plaintiff in its post-trial brief, is not an absolutely binding judicial admission, but instead is a mere ordinary evidentiary admission which may be disregarded by a trial court as — "only one factor to be considered together with the other evidence" (Ct. App. Op., 4). Southern Union averred in its Third Amended

Complaint that the parties had agreed to "substitute . . . Wynn Exploration in place of . . . Wynn Oil" as the party contracting with Southern Union (5 R. 1812 ¶ 8); Wynn Oil and Wynn Exploration admitted this allegation in their Answer (5 R. 1886 ¶ 7); and Southern Union again stated in its post-trial brief that by written agreement Wynn Exploration was "substituted for Wynn Oil as the contracting party" with Southern Union (10 R. 3466). The Court of Appeals held that these admissions of substitution by Southern Union were mere ordinary evidentiary admissions, which were not binding on the trial court and the parties, contrary to this Court's clear holding in *Cessna* that admissions made in pleadings are judicial admissions which conclusively bind the parties and the court. (Argued Point I, Pet. for Writ of Cert.)

The Court of Appeals has effectively overruled the judicial admissions doctrine, heretofore universally recognized by the courts of New Mexico. A rule that provides that a judicial admission is "only one factor to be considered together with the other evidence" will strip from the pleadings their most vital function — definition of those factual issues upon which the parties disagree and which therefore must be tried, and of those factual issues upon which the parties agree and which therefore are not to be tried.

(2) The Court of Appeals violated this Court's controlling decision in *Jernigan v. New Amsterdam Casualty Co.*, 69 N.M. 336, 367 P.2d 519, 523 (1961), by ruling that a trial court is free to completely disregard the construction placed on a written agreement by the parties to it (Ct. App. Op., 4). The parties all agreed below that a written letter agreement, dated 18 November 1975, signed on behalf of Southern Union and Wynn Exploration (Exhibit P-4), operated to "substitute . . . Wynn Exploration in place of . . . Wynn Oil" as the party contracting with Southern Union (5 R. 1812 ¶ 8, 1886 ¶ 7), and that by virtue of this letter agreement Wynn Exploration was "substi-

tuted for Wynn Oil as the contracting party" with Southern Union (10 R. 3466). The Court of Appeals ruled that this admitted construction of the letter agreement by the parties to it was not controlling, contrary to this Court's clear holding in *Jernigan* that "the construction placed upon a contract by the parties . . . is controlling" (367 P.2d at 523). (Argued Pt. I, Pet. for Writ of Cert.).

(3) The Court of Appeals violated the controlling Texas Supreme Court's decision in *Chastain v. Cooper & Reed,* 152 Tex. 322, 257 S.W.2d 422-27 (1953) and the controlling decision of this Court in *Dougherty v. Van Riper,* 16 N.M. 600, 120 P. 333, 334 (1911), by ruling that a person who is a party to an original contract is liable for the breach of a second contract, where the second contract admittedly operated to "substitute" a new party "in place of" the original party "as the contracting party," and where the second contract substituted new rights and obligations for the rights and obligations created by the original contract. Wynn Oil and Southern Union were signatory parties to two documents: a letter agreement dated 8 September 1975 (Exhibit P-1), and a printed form operating agreement dated 15 September 1975 (Exhibit P-3). A letter agreement dated 18 November 1975, signed by Southern Union and Wynn Exploration (Exhibit P-4), "substituted" Wynn Exploration "in place of" Wynn Oil as "the contracting party" with Southern Union, and also substituted a new measure of rights and obligations for that set out in the first two documents. The Court of Appeals ruled that this substitution of parties and obligations had not effected a novation, contrary to the rule that a novation is "the *substitution* of a new contract between the same or different parties by exchanging a new obligation for the existing one." *Hildago County v. Pate,* 443 S.W.2d 80, 89 (Tex. Civ. App. — Corpus Christi 1969, writ ref'd n.r.e.) (emphasis added); *Chastain v. Cooper & Reed,* 152 Tex. 322, 257 S.W. 2d 422 (1953); *Dougherty v. Van Riper,* 16 N.M. 600, 120 P. 333, 334 (1911) ("Novation means simply the *substitution*

of one debtor by mutual agreement for another") (emphasis added). (Argued Pt. II, Pet. for Writ of Cert.).

The Court of Appeals has effectively ruled, that a substitution of parties and obligations is not a novation unless there is an express release and the original obligor has expressly agreed to be released. As discussed in Wynn Oil's Petition, this ruling is contrary to controlling authority. The effect in this case is to impose an onerous financial burden on an innocent party who was entitled to rely on well-settled law in Texas and New Mexico that an express release is not necessary.

(4) The Court of Appeals violated controlling decisions in *Barnes v. Sadler Associates, Inc.*, (No. 13154, January 14, 1981); *Gallup Electric Co. v. Pacific Improvement Co.*, 16 N.M. 86, 113 P. 848 (1911); and *Burkhart v. Brownfield*, 33 S.W.2d 885 (Tex. Civ. App. — Fort Worth 1930, no writ), by ruling that a party may be held liable for the breach of a contract to which it was not a party. Southern Union sought damages for the breach of, and the trial court found the existence and breach of, but one contract — a contract consisting of the letter agreement dated 18 November 1975 (Exhibit P-4), together with the two documents referenced therein (10 R. 3638, Finding 4). The Court of Appeals correctly ruled that Wynn Oil was not a party to the 18 November 1975 letter agreement (Ct. App. Op., 5), and hence, not a party to the one contract pled, tried, and found. However, the Court of Appeals ruled that Wynn Oil was nonetheless liable for the breach of this contract, contrary to the fundamental, universally recognized rule that a person cannot be held liable for the breach of a contract to which it is not a party. (Argued Point II, Pet. for Writ of Cert.).

(5) The Court of Appeals violated this Court's ruling in *Leonard Farms v. Carlsbad Riverside Terrace*, 90 N.M. 34, 559 P.2d 411 (1977), by awarding judgment on a theory that was not pled or tried below. Southern Union pled and

proved the existence of only one contract, to which Wynn Oil was not a party, and therefore the Court of Appeal's decision is contrary to this Court's clear holdings in *Leonard Farms* that a "court may not grant judgment for relief which is neither requested by the pleadings nor within the theory on which the case was tried" (90 N.M. 34, 559 P.2d at 413). (Argued Pt. III, Pet. for Writ of Cert.).

(6) The Court of Appeals violated this Court's holding in *Guidry v. Petty Concrete Co.*, 77 N.M. 531, 424 P.2d 806 (1967), by making implicit fact-findings on the basis of conflicting evidence, in order to support its theory of liability, which facts had not been found by the trial court. The Court of Appeals held Wynn Oil liable on the basis of two documents bearing its name (Ct. App. Op. 2, 6, 7). In order to so hold, it necessarily concluded that these two documents, standing alone, constituted an extant contract; that is, that as of the date the second document was signed, (1) there had been a meeting of the minds between Wynn Oil and Southern Union, (2) which was accurately reflected by the two documents, and (3) which was still in effect as of the date of the alleged breach.

The Court of Appeals implicitly made these fact-findings on the basis of conflicting evidence, contrary to the rule clearly stated by this Court in *Guidry* that an appellate court "will not originally determine . . . questions of fact" not decided below (424 P.2d at 808). (Argued Pt. III, Pet. for Writ of Cert.).

Wynn Oil Company's Petition for Writ of Certiorari raises important issues of contract and procedural law requiring consistent and reliable answers. If the Court of Appeal's decision is allowed to stand, it will adversely affect the financing and development of vitally important oil, gas and other commercial enterprises and also the judicial resolution of disputes in New Mexico, since it injects large and unacceptable measures of risk and un-

certainty into areas of law where stability and reliability are essential in the public interest.

WHEREFORE, Petitioner Wynn Oil Company prays that the Court reconsider its February 18, 1981 order denying the Petition for Writ of Certiorari in this case, and that it issue said Writ and reverse the decision of the Court of Appeals.

Respectfully submitted,

BIGBEE, STEPHENSON, CARPENTER,
CROUT & OLMSTED
P. O. Box 669
Santa Fe, New Mexico 87501

By DONNAN STEPHENSON
Donnan Stephenson

CHARLES D. OLMSTED
Charles D. Olmsted

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MODRALL, SPERLING, ROEHL,
HARRIS & SISK
P. O. Box 2168
Albuquerque, New Mexico
87103

Attorneys for Petitioner
Wynn Oil Company

The undersigned hereby certifies that on February 23, 1981, he caused a copy of the foregoing pleading to be mailed or hand-delivered to all counsel of record.

Charles D. Olmsted

APPENDIX M

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 13,505

WYNN OIL COMPANY,

Petitioner,

vs.

SOUTHERN UNION EXPLORATION COMPANY,

Respondent.

SECOND MOTION FOR REHEARING

In support of this Second Motion for Rehearing as to its Petition for Writ of Certiorari, Petitioner Wynn Oil Company ("Wynn Oil") states:

I

In denying Wynn Oil's petition, the Court has overlooked or misapprehended the following points of law and fact:

1. By ruling that Wynn Oil was liable for breach of a contract as an unreleased party thereto, the trial court violated the Due Process clauses of the 14th Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution in that:

a. Plaintiff Southern Union Exploration Company's ("Southern Union") complaint sought damages for the alleged breach of the Gallagher Prospect contract to develop and operate oil and gas properties which was formed by three documents — namely:

(1) A letter agreement (the "First Agreement" — Exhibit P-1) dated 8 September 1975 between Southern Union, as a twenty-five percent owner, and Wynn Oil, as a seventy-five percent owner;

(2) A printed form operating agreement (the "Second Agreement" — Exhibit P-3) dated 15 September 1975, between Southern Union, as operator and twenty-five percent owner, and Wynn Oil, as a seventy-five percent owner; and

(3) A letter agreement (the "Third Agreement" — Exhibit P-4) dated 18 November 1975 between Southern Union, as fifty percent owner, and Wynn Exploration Company ("Wynn X"), as fifty percent owner, which expressly amended the First and Second Agreements.

b. Southern Union's complaint alleged that the Third Agreement substituted Wynn X in the place of Wynn Oil as a party to the Gallagher Prospect contract and increased Southern Union's interest from twenty-five to fifty percent; said allegations as to the Third Agreement were admitted by the answer of Wynn Oil and the other defendants.

c. Southern Union's complaint alleged that Wynn Oil was liable for breach of the three document Gallagher Prospect contract on alter ego theories — i.e., because both Wynn Oil and Wynn X were the alter egos of defendant R. C. Wynn; further, said complaint did not allege that Wynn Oil was a party to said contract when the same was breached and did not allege any other factual basis for liability as to Wynn Oil for breach of said contract.

d. In the pre-trial order of the trial court, Southern Union did not amend its complaint or claims as to the alleged basis of Wynn Oil's liability to it.

e. At the trial of this cause, Southern Union did not seek to amend its complaint or claims, and no evidence was introduced tending to prove that Wynn Oil was a party to the Third Agreement or that Wynn X was not substituted in the place of Wynn Oil as a party to the Gallagher Prospect contract by the Third Agreement or that the Third

Agreement did not effect the release of Wynn Oil as a party to the Gallagher Prospect contract.

f. In its final judgment, the trial court held that Wynn Oil and R. C. Wynn were not liable on alter ego theories but found that Wynn Oil was a party to the Third Agreement, that the Third Agreement did not substitute Wynn X in the place of Wynn Oil, that, by the Third Agreement, Wynn Oil merely assigned its rights and obligations to Wynn X, that Southern Union did not intend to release Wynn Oil from said obligations, and, therefore, that both Wynn Oil and Wynn X were liable to Southern Union for breach of the Gallagher Prospect contract.

g. By reason of the foregoing matters, Wynn Oil never received notice or an opportunity to be heard as to the factual or legal basis of liability against it found by the trial court, and, accordingly, Wynn Oil was denied procedural due process in violation of the above-cited Due Process clauses.

2. By ruling that Wynn Oil was liable for breach of the Gallagher Prospect contract, the Court of Appeals also violated the Due Process clauses of the 14th Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution in that:

a. The decision of the Court of Appeals affirmed the trial court's judgment that Wynn Oil and R. C. Wynn were not liable to Southern Union for breach of the Gallagher Prospect contract on alter ego theories, but reversed the trial court's judgment that Wynn Oil was liable to Southern Union for breach of the Gallagher Prospect contract as a party to the Third Agreement and as an unreleased assignor thereunder.

b. Nevertheless, the decision of the Court of Appeals overruled the judicially admitted fact that the Third Agreement substituted Wynn X in the place of Wynn Oil as a party to the Gallagher Prospect contract and sub-

stituted new measures of rights and obligations thereunder, and said decision independently found and ruled that Wynn Oil was liable for breach of the Gallagher Prospect contract because it had been a party to the superseded or amended First and Second Agreements which formed a part of said contract. Thus Wynn Oil was found liable as a party to a two document contract, even though Southern Union sued Wynn Oil and the trial court found the Gallagher Prospect contract consisted of all three documents. Moreover, Wynn Oil was found liable by the Court of Appeals for obligations imposed by the Third Agreement, to which the Court of Appeals had previously found Wynn Oil was not a party.

c. By reason of the foregoing, Wynn Oil never received notice or an opportunity to be heard as to the factual or legal basis of liability against it found by the Court of Appeals — which basis was not alleged or tried by Southern Union in the trial court or briefed to the Court of Appeals by Southern Union — and, accordingly, Wynn Oil was denied procedural due process in violation of the above-cited Due Process clauses.

3. By ruling — in the absence of allegation and proof (a) that Wynn X was the alter ego of Wynn Oil, (b) that Wynn Oil interfered with Wynn X's performance of the Gallagher Prospect contract, or (c) that Wynn Oil was a party to the Gallagher Prospect contract formed by the Third Agreement — that Wynn Oil was nevertheless liable to Southern Union for breach of said contract, both the trial court and the Court of Appeals have acted arbitrarily, capriciously and in violation of established principles of law and judicially admitted facts, and have denied Wynn Oil its constitutionally guaranteed substantive due process and taken Wynn Oil's property in violation of the above cited Due Process clauses.

4. All three agreements comprising the Gallagher Prospect contract were made by Texas residents in Texas

pursuant to and subject to Texas laws which provide that a new agreement between an obligee and a new obligor substituting the new obligor in the place of an old obligor and new obligations in place of old obligations, as alleged by Southern Union in its complaint and admitted by Wynn Oil and all other defendants in their answer in connection with the Third Agreement, said substitution agreement effects a release of the old obligor and the old obligation unless it is affirmatively alleged and proven by the obligee that he communicated an intention not to release the old obligor and old obligation. *Chastain v. Cooper & Reed*, 152 Tex. 322, 257 S.W.2d 422 (1953). In deciding that the Third Agreement did not so release Wynn Oil from, or the old obligations of, the First and Second Agreements, the trial court and the Court of Appeals failed to give full faith and credit and controlling effect to said Texas law in violation of Article IV, Section 1 of the United States Constitution.

II

Wynn Oil's Petition for Writ of Certiorari and this motion raise important issues of constitutional, contract and procedural law requiring consistent and reliable answers by the Court. If the Court of Appeals' decision is allowed to stand, it will adversely affect the financing and development of vitally important oil, gas and other commercial enterprises and also judicial resolution of disputes in New Mexico, since it injects large and unacceptable measures of risk and uncertainty into areas of law where stability and reliability of essential in the public interests, as well as substantial violations of constitutional rights.

WHEREFORE, Wynn Oil prays that the Court reconsider its 18 February and 22 July, 1981 orders denying the petition for writ of certiorari in this case and permit Wynn Oil to brief and argue the same to the Court, and that the Court issue said writ and reverse the decision of the Court of Appeals.

Respectfully submitted,

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The undersigned hereby certifies that on August 3, 1981, he caused a copy of the foregoing pleading to be mailed or hand-delivered to all counsel of record.

Charles D. Olmstead

Opposition

Office - Supr
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DEC 22 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-971

WYNN OIL COMPANY,

Petitioner,

v.

SOUTHERN UNION EXPLORATION COMPANY OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO AND THE COURT OF APPEALS OF NEW MEXICO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

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October Term, 1981

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO AND THE COURT OF APPEALS OF NEW MEXICO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Background

This is a collection case which involves a simple breach of contract. In general terms, the written agreements between the parties provided that Southern Union Exploration Company of Texas ("SX")[1] as operator, and Wynn Oil

[1] SX was originally incorporated in the state of Delaware under the name Southern Union Supply Company. In 1978 the name was changed to Southern Union Exploration Company, and in January of 1981 to Southern Union Exploration Company of Texas. SX is a wholly owned subsidiary of Southern Union Company. Other wholly owned subsidiaries of Southern Union Company are: Southern Union Gathering Company, Southern Union Exploration Company (formerly Southern Union Properties, Inc.), Southern Union Realty Company, Southern Union Refining Company, Southern Union Financial Corporation and Western Gas Interstate Company.

Company ("Wynn Oil") and Wynn Exploration Company, Inc. ("Wynn Exploration") would participate in the drilling and development of certain oil and gas property in Lea County, New Mexico, known as the Gallagher Prospect.

By letter dated September 8, 1975, (SX Ex. 1)[2] Wynn Oil and SX agreed to participate in the project, and Wynn Oil and SX signed a written operating agreement dated September 15, 1975. (SX Ex. 3) Wynn Oil had a 75% interest in the project and SX had a 25% interest in the project by virtue of the initial documents.

After the initial documents were signed, a third document, a letter agreement dated November 18, 1975, was signed by Wynn Exploration and SX. (SX Ex. 4) The third document added Wynn Exploration as an obligor on the contract and changed the percentage interest of the parties to 50% each. R. C. Wynn, the sole stockholder, director and president of both Wynn Oil and Wynn Exploration (T. 817, 821, 823), added Wynn Exploration as a party for tax, accounting and divorce settlement considerations. (T. 841) Contrary to statements in Wynn Oil's Petition at p. 6, the November 18, 1975 letter did not remove Wynn Oil from the contract nor did it release Wynn Oil from its obligations under the contract.

SX commenced drilling the Gallagher Prospect in late 1975. SX began billing the Wynn corporations for their initial share of the drilling expenses in February 1976. Again, contrary to Wynn Oil's statement, payment demands and other contract documents were sent to and replied to by Wynn Oil as well as Wynn Exploration. (SX Ex. 66, SX Ex. 117, T. 3389) Although bills were due 15

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[2]References to the Record Proper not included in the Appendices are cited as "R." with page numbers. References to the trial transcript below are cited as "T." with page numbers. References to trial exhibits below are cited as SX Ex. with exhibit numbers.

days after receipt, the Wynn corporations refused to pay any billings sent by SX. (T. 866) The Wynn corporations initially refused to pay their bills because of alleged discrepancies (R. 1467) but they also withheld payment of admittedly just bills to gain bargaining leverage in their dealings with SX. (T. 2921-22) The ultimate amount which the Wynn corporations refused to pay was in excess of $1.8 million. By their refusal to pay, the Wynn corporations placed the entire burden and risk of the project on SX. (T. 3389-90)

B. Legal Proceedings

When it became apparent that the Wynn defendants intended "to ride SX" (R. 3390), SX filed suit against the Wynn corporations. In SX's original complaint, filed June 26, 1976, SX named Wynn Oil as a party defendant (R. 1), alleged that SX and Wynn Oil entered into the September 8, 1975 letter agreement regarding exploration of the Gallagher Prospect (R. 2) and alleged that SX and Wynn Oil entered into the September 15, 1975 operating agreement to develop the Gallagher Prospect. (R. 2-3) The original complaint further alleged that on November 18, 1975, there was a transfer between Wynn Oil and Wynn Exploration regarding the Gallagher Prospect asset. (R. 3) However, SX made it clear that it considered Wynn Oil to be liable on the contract when it expressly alleged that both Wynn Oil and Wynn Exploration had breached the written agreement (R. 3-4) and prayed for judgment against both Wynn Oil and Wynn Exploration for breach of the written contract as well as relief under other causes of action. (R. 6-7)

SX's pattern of pleading against Wynn Oil described above was maintained throughout three amendments to the complaint. (R. 60, 158, 1810) In each amended complaint,

Wynn Oil was identified as a party defendant, a party to the contract, alleged to be in breach of contract and judgment was prayed for against Wynn Oil as well as Wynn Exploration on all causes of action.

Moreover, as required by Rule 9(k) of the New Mexico Rules of Civil Procedure, SX attached the written documents upon which SX's claim for breach of contract was based to the original complaint and to each amendment. These written documents clearly identified Wynn Oil as a contracting party. In addition, the exhibits identified that a transfer of the asset had been made from Wynn Oil to Wynn Exploration. However, the pleadings indicate that SX did not treat the transfer as a release of Wynn Oil because SX continually and consistently sought judgment against Wynn Oil for breach of contract.

Thus, Wynn Oil was put on notice that SX was seeking judgment against Wynn Oil for breach of the written agreement from the time of the first pleading in this litigation. Because SX identified the Wynn Oil-Wynn Exploration transfer, it was obvious from the initial pleading, as the trial court ultimately found, that Wynn Oil had not been released from its obligations to SX by the addition of Wynn Exploration in the November 18, 1975 letter agreement.

Contrary to Wynn Oil's statement (Wynn Oil Petition, p. 8), SX tried the case against Wynn Oil on the theory pleaded, that is, breach of contract by Wynn Oil. SX's theory was that Wynn Oil had become obligated to SX by virtue of the initial contract documents and that Wynn Oil was not released by the November 18, 1975 letter agreement by which Wynn Exploration was added as a party to the transaction. Again, contrary to Wynn Oil's statement (Wynn Oil Petition, p. 8), SX's trial brief reiterated the breach of contract argument and asked for judgment

against Wynn Oil as well as Wynn Exploration for breach of contract. (R. 3543-44)

Wynn Oil obviously had notice of SX's claim against it because in the pleading, discovery and trial stage of this case, Wynn Oil raised a specific defense to the breach of contract count. Wynn Oil's position was that Wynn Oil had never signed *any* contracts with SX regarding the Gallagher Prospect. Wynn Oil maintained that the transaction was always to be in Wynn Exploration and that SX had mistakenly prepared, and Wynn Oil had mistakenly signed, the initial contract documents.[3]

By letter dated March 19, 1979 the court advised the parties of its decision in which it found in favor of SX on its complaint against both Wynn corporations. The trial court further rejected all of Wynn Exploration's counter-claims. (R. 3545) The trial court entered detailed findings of fact and conclusions of law which rejected Wynn Oil's theory that Wynn Oil was not liable to SX because Wynn Oil plainly appeared as a signatory to the initial contract documents. (R. 3638, Finding No. 4) The trial court further found that the third document did not release Wynn Oil from its contract obligations. (R. 3639, Finding No. 5) The trial court's decision was that both Wynn corporations, Wynn Oil and Wynn Exploration, were in breach of contract.

Wynn Oil suggests at pages 9 and 10 of its Petition that it was unfairly treated in proceedings after the trial judge made his decision and before entry of judgment. Wynn Oil's

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[3] It is true that Wynn Exploration counterclaimed against SX. (R. 1883) However, contrary to Wynn Oil's statement (Wynn Oil Petition, pp. 6-7), the Wynn defendants refused payment prior to any claim against SX for negligent drilling and development of the property.

letter requesting "clarification" was actually a rehash of arguments made at trial and was nothing more than an informal appeal of the decision. In accordance with local practice, SX submitted requested findings of fact and conclusions of law. The Wynn defendants failed to file requested findings of fact and conclusions of law within a reasonable time after the trial court's decision, and the court entered its findings of fact, conclusions of law and judgment on April 27, 1979. As admitted by Wynn Oil (Wynn Oil Petition, pp. 9-10), the trial court excused the Wynn defendants' default in this regard and allowed them ample time to file their requested findings and conclusions. On May 11, 1979, after reconsidering the Wynn defendants' requested findings and conclusions, a judgment was entered in favor of SX against Wynn Oil and Wynn Exploration in the amount of $1,879,791.22. All claims by Wynn Exploration were dismissed. (Judgment, R. 3645).

On July 3, 1979 a supersedeas bond in the sum of $1,500,000.00 was posted on behalf of Wynn Oil. Wynn Exploration did not supersede the judgment and the operator's lien against its interest in the Gallagher Prospect was foreclosed. There remains a deficiency for which both Wynn Exploration and Wynn Oil are liable in the amount of $2,032,679.26 as of July, 1981.[4]

The judgment against Wynn Oil bears interest at 10% per annum under New Mexico law. (§ 56-8-3 N.M.S.A. 1978)

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[4] R. C. Wynn was the president, sole stockholder and director of both Wynn corporations. (T. 817, 821, 823) At the time Wynn Exploration was proposed as a contracting party by R. C. Wynn in November of 1975, Wynn Exploration had no assets of value. (T. 830-831) Wynn Exploration remained a shell throughout this litigation and conducted no business except as a party litigant in this case, financed for that purpose by R. C. Wynn. At the conclusion of the litigation in the trial court, it was obvious that a judgment against Wynn Exploration would never be collectible.

It has been, and is now, to Wynn Oil's advantage to delay the conclusion of this case as long as possible because of the current high rates of interest. It is suggested that this Petition is part of a strategy to delay, as long as possible, the conclusion of this case.

C. Appellate Proceedings

In its brief in the New Mexico Court of Appeals, Wynn Oil did contend that the basis of liability of Wynn Oil, that it had undertaken certain obligations by signing the initial contract documents and had never been released therefrom, was neither pleaded nor tried. In response to Wynn Oil's argument that it did not have notice of the basis of liability, the Court of Appeals referred to the extensive pleading and discovery in this case and termed Wynn Oil's argument "frivolous." (Wynn Petition, p. A-4)

Wynn Oil's statement of its other arguments on appeal is not accurate. (Wynn Oil Petition, pp. 10-11) Wynn Oil argued on appeal, as it had in the trial court, that Wynn Oil had not intended to sign *any* contract documents and therefore was not a party to the contract with SX. Wynn Oil further argued that the trial court's findings that Wynn Oil had executed the contract and became a party thereto were not supported by substantial evidence. Alternatively, Wynn Oil argued for the first time on appeal that if it was held to have signed the initial contract documents, then the November 18, 1975 letter constituted a novation by which Wynn Oil was released from its contract obligations.

With regard to the issue of the liability of Wynn Oil, the New Mexico Court of Appeals observed that Wynn Oil did not sign the third document of the contract. (Wynn Petition, p. A-9) The Court of Appeals, however, held that Wynn Oil became liable to SX on the basis of the initial contract documents and was never released therefrom.

(Wynn Petition, p. A-10) Wynn Oil's argument that the November 18, 1975 letter worked a novation releasing Wynn Oil was also rejected. On this basis, the judgment of liability against both Wynn Oil and Wynn Exploration was upheld. The decision of the New Mexico Court of Appeals was entered January 18, 1981. The case was ordered remanded to the trial court for minor modifications of the judgment. A motion to enter a new judgment on the mandate with those modifications is presently pending in the trial court.

Wynn Oil's argument in its Petition that the Court of Appeals changed the findings of the trial court and the basis of Wynn Oil's liability is erroneous. (Wynn Oil Petition, p. 9) The Court of Appeals found Wynn Oil to have signed the initial contract documents and that the third document did not constitute a release or novation. Thus, the Court of Appeals did not sustain Wynn Oil's arguments regarding the essence of the trial court's findings against Wynn Oil. The Court of Appeals did not find a new basis for liability against Wynn Oil. At most, the Court of Appeals articulated the same basis for liability as the trial court in a slightly different way. Wynn Oil's attempt to make more out of the Court of Appeals' decision is totally without merit, and Wynn Oil's claim of surprise is not credible.

On February 3, 1981, Wynn Oil filed a petition for writ of certiorari in the New Mexico Supreme Court on the same underlying grounds stated in pages 11-12 of Wynn Oil's Petition in this Court, alleging that the New Mexico Court of Appeals changed the basis of Wynn Oil's liability. Wynn Oil's petition for certiorari was denied by the New Mexico Supreme Court on February 19, 1981.

On February 23, 1981, Wynn Oil filed a motion for rehearing of the New Mexico Supreme Court's order denying

its petition for certiorari. On March 10, 1981, the New Mexico Supreme Court granted the motion for rehearing but on July 22, 1981, it entered an order vacating its March 10, 1981 order and, at the same time denied, Wynn Oil's motion for rehearing. SX's Memorandum in Opposition to Wynn Oil's Petition for Writ of Certiorari on Rehearing is included as Appendix A hereto. On August 3, 1981, Wynn Oil filed a Second Motion for Rehearing which was denied without opinion on August 26, 1981. SX's Memorandum in Opposition to Wynn Oil's Second Motion for Rehearing is included as Appendix B hereto. It was not until Wynn Oil's Second Motion for Rehearing that the purported "federal questions" stated in Wynn Oil's Petition were raised in the state court.

In addition to the conventional proceedings on appeal described above, it should also be noted that Wynn Oil filed a petition for a writ of prohibition in the New Mexico Supreme Court to prevent the foreclosure of Wynn Exploration's interest in the Gallagher Prospect, a motion in the New Mexico Court of Appeals to remand the case for a new trial based on purportedly newly discovered evidence and, most recently, a motion in the New Mexico Court of Appeals to recall its mandate. All of these motions were denied. In sum, Wynn Oil exercised the full panoply of possible motions and petitions before the New Mexico district and appellate courts but did not seek to raise purported "federal questions" until the second motion for rehearing of the denial of certiorari by the New Mexico Supreme Court.

JURISDICTION

A. This Court Lacks Jurisdiction Because the Case Contains No Substantial Federal Question

It is settled that the United States Supreme Court will not accept a case on certiorari unless it presents a sub-

stantial federal question. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391 (1951); *Zucht v. King*, 260 U.S. 174, 176 (1922).

The present case is not appropriate for review because it is devoid of a substantial federal question. Even Wynn Oil acknowledges that this is a simple contract case between private parties. (Wynn Oil Petition, pp. 5-7) Wynn Oil and SX undertook to participate in a drilling venture in Lea County, New Mexico and were to share in the drilling, development and operating expenses and the profits, if any. At about the time drilling commenced, Wynn Exploration, another corporation solely owned and operated by R. C. Wynn, was added as an additional obligor to the transaction, but Wynn Oil was never released from its obligations. The Wynn corporations failed to pay their share of the drilling, development and operating expenses. SX sued Wynn Oil and Wynn Exploration for breach of contract. No federal question was ever presented in the voluminous pleadings in this case. No federal questions arose in discovery and no federal issues were suggested at trial. Similarly, no federal questions were suggested on appeal until a second motion for rehearing was filed. This occurred after the appellate proceedings had consumed over two years. On its Second Motion for Rehearing in the New Mexico Supreme Court, Wynn Oil claimed for the first time that it had been deprived of due process of law and equal protection of the law under the United States Constitution because it did not have "notice" that it was being sued for breach of contract.

In another contract case between private parties, *Black v. Cutter Laboratories,* 351 U.S. 292 (1955), this Court denied a petition for certiorari on the basis of lack of a substantial federal question. This Court said:

> As such, the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented.

351 U.S. at 299.

Like *Black*, the decision of the New Mexico courts involves a determination of the rights and obligations under state law of a contract between private parties. There is no treaty, no federal statute, no federal regulation and no issue of federal law in this case which would suggest that this Court accept this case on certiorari.

Moreover, the procedure by which Wynn Oil purported to raise federal questions in this case has specifically been found insufficient. In *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 112 (1908), the petitioner for the first time attempted to raise federal questions in its petition for rehearing of the final decision of a state supreme court. This Court rejected the petition for certiorari and said:

> The attempt to assign new errors in the petition for rehearing, which was overruled without an opinion passing on Federal questions, cannot avail.

212 U.S. at 118.

The situation in the present case is identical to *Waters-Pierce*. Wynn Oil's attempt to raise federal questions for the first time in its *second* petition for rehearing before the New Mexico Supreme Court was denied *without an opinion* passing on the purported federal questions.

This case contained no federal questions and Wynn Oil's attempt to inject federal questions at a second motion for rehearing is inadequate procedurally to sustain the jurisdiction of this Court. The acceptance of a petition for certiorari in this case would merely invite additional frivolous petitions for certiorari lacking substantial federal questions.

B. This Court Lacks Jurisdiction Because the Purported Federal Question was Not Timely Raised Below

This Court does not have jurisdiction of a case if a federal question is not raised timely. The attempt to raise a federal issue on a motion for rehearing after the final decision of a state supreme court is not timely. In *Citizens National Bank v. Durr,* 257 U.S. 99 (1921), a case which is procedurally very similar to the present case, this Court denied a petition for certiorari because the claimed federal question was not timely raised. This Court said:

> After the final decision, in an application for a rehearing, plaintiff for the first time asserted that the decision, if adhered to, rendered the Ohio taxation statutes invalid because of such repugnance [to the due process and equal protection provisions of the Fourteenth Amendment]. This application was denied without reasons given, and hence must be regarded as having come too late to raise any questions for review by this court.

257 U.S. at 106.

The same result was reached in *Rooker v. Fidelity Trust Co.,* 261 U.S. 114 (1922). There, the Court said:

> It [the record] has been examined, and we find it does not show that the question was raised in any way prior to the judgment of affirmance in the Supreme Court. In their assignments of error on the appeal to that Court the plaintiffs said nothing about the statute or its validity; nor was there any reference to either in the Court's opinion. All that appears is that, after the judgment of affirmance the plaintiffs sought to raise the question by a petition for rehearing, which

> was denied without opinion. But that effort came too late . . . It is at least doubtful that the question is one of any substance, but its tardy presentation renders further notice of it unnecessary.

261 U.S. at 117.

This Court has considered a case in which the purported federal question was not raised until a second motion for rehearing, as in the instant case. In *Bilby v. Stewart*, 246 U.S. 255 (1918), a probate case, this Court held that the federal question was not timely raised. This Court said:

> The Supreme Court affirmed the judgment of the lower court and a petition for rehearing was denied without a statement of reasons. No Federal question had been raised in the district court, nor apparently up to that time in the supreme court. But an application was then made for leave to file a second petition for rehearing; and in it proponents set up, among other things, the claim that because Bruner was full-blooded Creek Indian "the execution of said will and the legal effect thereof and the necessity or nonnecessity of the probation of said will is thereby involved in this cause and presents Federal questions." We need not, however, consider this contention. For since the Supreme Court rests its judgment upon an non-Federal ground adequate to support it, the existence of a Federal question is of no significance. [Citation omitted] And, besides, the attempt to raise it comes too late. [Citation omitted] The writ of error is dismissed.

246 U.S. at 257.

Rooker, Durr and *Bilby* are authority to dismiss Wynn Oil's petition for failure to raise the purported federal question in a timely manner. As in each of these cases,

no federal question was raised in the trial court or in the appellate court until after the state supreme court had made its final decision. Then, in a petition for rehearing, purported federal questions were raised for the first time. These cases make clear that such attempts to raise federal questions are not timely. Hence, Wynn Oil's petition for writ of certiorari should be dismissed because the purported federal question was not timely raised.

C. This Court Lacks Jurisdiction Because the Petition Was Not Timely Filed

28 U.S.C. § 2101(c) sets the time limit for filing a petition for writ of certiorari in the United States Supreme Court in civil cases. 28 U.S.C. § 2101(c) provides that the writ of certiorari shall be "applied for within 90 days after the entry of such judgment or decree" in civil cases coming from state courts.

In the event that the act of the state appellate court is a denial of a petition for writ of certiorari, the time limit begins to run from the date of the denial of the petition for certiorari. *American Ry. Express Co. v. Levee,* 263 U.S. 19, 21 (1923) ("Of course, the limit of time for applying to this Court was from the date when the writ of certiorari was refused.").

If there is a motion of rehearing, Rule 20 of the United States Supreme Court Rules provides that the time limit begins to run upon the denial of the petition for rehearing. This rule is based on the theory that the petition for rehearing in the state court stays the effect of the state court decision. This principle was articulated in *Dept. of Banking v. Pink,* 317 U.S. 264 (1942). In *Pink,* the Court held that the petition for rehearing involved did not have the effect of tolling the statute, and so the petition for certiorari was not timely. The Court said:

> A timely petition for rehearing tolls the running of the three-month period because it operates to suspend the finality of the state court's judgment, pending the court's further determination of whether the judgment should be modified so as to alter its adjudication of the rights of the party. Here, no such alteration of the rights adjudicated was asked, and the finality of the court's first order was never suspended. Accordingly, we must deny the petition on the ground that it was not filed within the time provided by law.

317 U.S. at 266-67.

In New Mexico, the filing of a motion for rehearing also has no effect upon the prior decision of the court. Rule 19(c) of the New Mexico Rules of Appellate Procedure provides:

> The granting of a motion for rehearing shall have no effect on the prior decision of the Court, but such decision shall remain in full force and effect unless and until it is withdrawn or amended by direction of the appellate court.

Thus, *Pink* is authority for holding that the date upon which the time for filing a petition for certiorari in this case began to run is February 18, 1981. On that date, the New Mexico Supreme Court denied Wynn Oil's petition for certiorari.

The crucial dates regarding Wynn Oil's Petition are:

1. January 13, 1981 — New Mexico Court of Appeals enters its decision.
2. February 18, 1981 — New Mexico Supreme Court denies Wynn Oil's Petition for Writ of Certiorari

3. March 10, 1981 — New Mexico Supreme Court grants a Motion for Rehearing of Order Denying Petition for Writ of Certiorari

4. July 22, 1981 — New Mexico Supreme Court vacates March 10, 1981 Order and simultaneously denies Motion for Rehearing

5. August 26, 1981 — New Mexico Supreme Court denies Wynn Oil's Second Motion for Rehearing

6. November 24, 1981 — Wynn Oil files Petition for Writ of Certiorari in U.S. Supreme Court

The application of the law to these facts is a clear matter. The New Mexico Court of Appeals entered its decision on January 13, 1981. Wynn Oil petitioned the New Mexico Supreme Court for a Writ of Certiorari which was denied on February 18, 1981. After February 18, 1981, Wynn Oil filed two motions for rehearing, each of which was ultimately denied. However, by reason of Rule 19(c) of the New Mexico Rules of Appellate Procedure, Wynn Oil's motions for rehearing did not have any effect on the New Mexico Supreme Court's prior decision to deny certiorari. The decision was never withdrawn or amended by direction of any appellate court. Thus, February 18, 1981 was the date on which the 90 days prescribed in 28 U.S.C. § 2101(c) began to run. The time for filing a petition for certiorari in the United States Supreme Court expired 90 days later, on May 15, 1981. Wynn Oil's petition for writ of certiorari in the United States Supreme Court was not filed until on or about November 24, 1981. Thus, Wynn Oil's petition was filed almost six months late and must be denied.

Even if the New Mexico appellate rules provided that the filing or granting of a motion for rehearing suspended the finality of the New Mexico Supreme Court's decision, or if Rule 20 of the United States Supreme Court is given effect despite the New Mexico rules, Wynn Oil's petition for writ of certiorari to the United States Supreme Court is still out of time. The reason is that the time limit provided in 28 U.S.C. § 2101(c) begins to run from the date of denial of the first petition for rehearing if there are two or more petitions for rehearing. The time for application for certiorari is unaffected by application for or denial of second or subsequent motions for rehearing because the filing of successive motions for rehearing might indefinitely postpone the time for review. *Morse v. United States,* 270 U.S. 151 (1926). See also *Gypsy Oil Co. v. Escoe,* 275 U.S. 498, 499 (1927). ("But it [time to file petition for certiorari] begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing.")

Thus, even if Wynn Oil's first motion for rehearing did suspend the finality of the state court's decision, the time for petitioning the United States Supreme Court for certiorari commenced to run on July 22, 1981 when Wynn Oil's first Motion for Rehearing was denied by the New Mexico Supreme Court.[5] The ninety days allowed by 28 U.S.C. § 2101(c) expired October 20, 1981. Wynn Oil's petition for certiorari was not filed until November 24, 1981, and, accordingly, it is over one month late.

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[5] It should be noted that the New Mexico appellate rules do not expressly provide for second or subsequent motions for rehearing. See Rule 19(a), N.M. R. App. P. Similarly, Rule 20 of this Court refers to *a* petition for rehearing and clearly does not contemplate an endless succession of motions or petitions for rehearing not specifically permitted by state court rule, decision or statute.

ARGUMENT

Reasons the Writ in This Case Should Not Be Granted

Rule 17 of the Rules of the United States Supreme Court provides, in part, regarding considerations governing review on certiorari:

"1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."

The principle embodied in Rule 17 was expanded upon in *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1954). In *Rice*, the Court said:

> In the words of Mr. Chief Justice Taft, speaking for a unanimous Court:
>
> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, *the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarassing conflict of opinion and authority between the circuit courts of appeals.*" *Lane Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.C. 422 (Emphasis supplied.)

349 U.S. at 79.

Based upon a reading of Rule 17 and *Rice*, this case does not present a situation which qualifies for consideration on certiorari by the Supreme Court.

1. The Decision in This Case Does Not Conflict With Any of This Court's Opinions or Any Court's Opinion.

At no place in the Petition does Wynn Oil contend that the decision of the New Mexico courts is in conflict with any opinion of this Court or any other court. In essence, this case presents a state court interpretation of a contract between private parties on facts peculiar to this case. There are no federal issues involved in the contract interpretation and no federal statutes come into play. As such, the decision is not in conflict with any state or federal decisions.

2. The Decision in This Case Affects Only the Litigants Involved and Has No Application Beyond Those Litigants.

Wynn Oil acknowledges that this is a case which will affect only Wynn Oil and SX. (Wynn Oil Petition, p. 14) There is no principle involved here which will have application beyond the parties even if this case were to be accepted for consideration on certiorari.

3. The Decision of the New Mexico Court is Correct.

Finally, the decisions of the New Mexico trial and appellate courts have not departed from the accepted and usual course of judicial proceedings. On the contrary, the courts in this case have done justice between the parties. The essence of Wynn Oil's Petition is that it did not have either notice or opportunity to defend itself on the basis of liability which was ultimately sustained by the New Mexico courts. The basis of liability found by the trial court and sustained by the appellate courts in New Mexico was simply that Wynn Oil was the signatory to a contract regarding the development of certain oil and gas property in New Mexico. Wynn Oil was never released from its obligations although

there was a subsequent document by which another Wynn corporation, Wynn Exploration, was added as an obligor on the contract.

Wynn Oil's claim that it had no notice of this theory of liability is totally unfounded. As indicated earlier, SX, in its initial complaint, sued Wynn Oil and Wynn Exploration on the contract. It is true that SX had an alternative theory of recovery, alter ego, but from the outset SX sought to obtain a judgment against Wynn Oil as well as Wynn Exploration for breach of contract. The written agreements were attached to the complaint and the three amendments to the complaint. SX in its pleadings identified the Wynn Oil - Wynn Exploration transfer but still sought judgment against Wynn Oil for breach of the contract. Therefore, Wynn Oil was clearly on notice that SX believed Wynn Oil to be liable for breach of the written contract.

The discovery phase of this case took over two years and there are some 4,000 pages of pleadings excluding depositions. Wynn Oil took the deposition of SX's chief executive officer three times during trial preparation. Had the pleadings been unclear in the least, Wynn Oil certainly had ample opportunity to find out the basis for SX's claims against Wynn Oil.

At the trial itself, SX introduced as proof of its claim all of the contract documents and sought judgment for breach of contract against Wynn Oil. The biggest flaw in Wynn Oil's argument that it lacked notice that SX was seeking judgment against it for breach of contract is that Wynn Oil presented a defense on this issue at trial. Wynn Oil's defense at trial was that it did not intend to sign *any* of the contracts. R. C. Wynn claimed that it was just a mistake that the initial contracts had been signed by himself on behalf of Wynn Oil. The trial court rejected Wynn's testimony and found that Wynn Oil was a signatory to the

contracts. The trial court entered judgment against Wynn Oil and Wynn Exploration because both were parties to the contracts. Wynn Oil undertook certain obligations, was never released from them and failed to discharge them.

After Wynn's trial defense failed, Wynn Oil tried a new and different theory on appeal. In the Court of Appeals, Wynn Oil argued that if it had signed the first two documents, the November 18, 1975 letter constituted a novation as a matter of law thereby releasing Wynn Oil from obligations that it had undertaken. Again, Wynn Oil's argument is proof that Wynn Oil had notice of the basis of the judgment against it and raised a defense.

Again, the gist of the decision of the Court of Appeals is the same pleaded by SX and found by the trial judge. Wynn Oil undertook certain obligations in writing and was never released therefrom. Accordingly, the decision of the New Mexico courts in this case is correct and there is no reason to grant Wynn Oil's petition for certiorari.

CONCLUSION

In sum, Wynn Oil had adequate notice of SX's claims in this litigation. Wynn Oil defended the claims vigorously, and presented multiple defenses in the trial and appellate courts of New Mexico. The rejection of Wynn Oil's arguments is not a basis for review of this case by this Court, and certainly not on the ground of lack of notice, opportunity to defend or unequal treatment. Rather, Wynn Oil has taken full advantage of the judicial system to avoid payment of a substantial and just debt and the time has

arrived to terminate this litigation. SX respectfully requests that Wynn Oil's Petition be denied.

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Dated: December 21, 1981

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 13,505

WYNN OIL COMPANY,

Petitioner,

vs.

SOUTHERN UNION EXPLORATION COMPANY OF TEXAS,

Respondent.

SOUTHERN UNION EXPLORATION COMPANY'S MEMORANDUM IN OPPOSITION TO WYNN OIL'S PETITION FOR WRIT OF CERTIORARI ON REHEARING

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I.

PRELIMINARY STATEMENT

This is a collection case which arises out of the breach by Wynn Oil Company ("Wynn Oil") and Wynn Exploration Company, Inc. ("Wynn X") of a written contract with Southern Union Exploration Company (formerly Southern Union Supply Company) ("SX") to participate in the exploration, drilling and development of certain oil and gas properties known as the Gallagher Prospect in Lea County, New Mexico (P. Ex. 1, 3, 4)[1] The first two documents comprising the agreement between the parties (P. Ex. 1 and 3) were executed by Wynn Oil on September 8, 1975 and September 15, 1975. The third document dated November 24, 1975 effected a transfer of the Gallagher Prospect from Wynn Oil, a corporation with assets, to Wynn X, a corporation devoid of assets (P. Ex. 4; T. 830-31). SX, as operator of the Gallagher Prospect, began drilling in late 1975. Thereafter, in February of 1976, SX began billing the Wynn defendants for their share of the drilling expenses. Under the Operating Agreement of September 15, 1975, Wynn Oil agreed to pay its share of the drilling expenses on a monthly basis within 15 days after receipt of billing. The Wynn defendants failed and refused to pay any of the expenses billed by SX. (Finding of Fact No. 11, R. 3639-40) The trial court characterized the Wynn defendants' action as an apparent willful delay in the acknowledgment of a legitimate debt. (R. 3552) The failure of the Wynn defendants to pay any expenses on the project placed the entire burden and risk upon SX. (T. 3289-90) The trial court found as a fact that Wynn Oil was a party to the contract with SX and was

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[1] Transcript references in this Memorandum are to the record on appeal in New Mexico Court of Appeals Case Nos. 4168 and 4262, consolidated, *Southern Union Exploration Company et al. v. Wynn Oil Company, et al.*

never relieved from its written obligation to pay its 50 percent share of the expenses. (Finding of Fact No. 5, R. 3639)

Accordingly, the trial court found that both Wynn Oil and Wynn X were liable to SX and entered judgment against both corporations in the amount of $1,879,791.22. (R. 3645) The Court of Appeals affirmed the liability of Wynn Oil and Wynn X and remanded the cause to the trial court for minor modifications of the judgment. Wynn Oil then filed a Petition for Writ of Certiorari which was denied. The Court of Appeals then issued its Mandate. Wynn Oil filed a Motion for Rehearing of its Petition for Writ of Certiorari. The Court of Appeals' Mandate was then filed in the trial court. The Supreme Court granted Wynn Oil's Motion for Rehearing although there is a serious question whether the Supreme Court had jurisdiction after the Mandate was filed in the trial court.

Following the transfer of the Gallagher Prospect from Wynn Oil to Wynn X, a shell corporation, R. C. Wynn, the sole stockholder and director of both Wynn Oil and Wynn X, placed no further assets in Wynn X. Also, Wynn X thereafter conducted no other business except to participate as a party litigant in this case. (T. 836) SX's judgment against Wynn X in this cause is worthless. Naturally, Wynn X does not contest liability, and the proceedings in this Court on Petition for Certiorari deal only with the efforts of Wynn Oil, the original contracting party, to evade financial responsibility for its written obligations[2] undertaken in September of 1975.[3]

---

[2] Wynn Oil has posted a $1,500,000.00 supersedeas bond and the judgment against it is believed to be collectible.

[3] Wynn Oil's obligation to SX and the judgment both bear interest at the rate of 10% per annum. It is common knowledge that the prime rate of interest presently exceeds 10% per annum. Accordingly, it is to Wynn Oil's advantage to delay payment of the judgment as long as possible.

The Petition for Writ of Certiorari was originally denied, and Wynn Oil's Motion for Rehearing on the Denial of the Petition for Certiorari again argues incorrectly that the Court of Appeals' decision is contrary to certain prior Supreme Court decisions. The Supreme Court should not have entertained Wynn Oil's Motion for Rehearing without a recall of the Mandate because the Court of Appeals' Mandate had already been filed in the trial court. Whether or not circumstances exist here which would justify a recall of the mandate is subject to very serious doubt. Although the Motion for Rehearing should have been denied for lack of jurisdiction, Wynn Oil's Petition is totally without merit if considered. The underlying bases of Wynn Oil's argument are the following three claims:

1. SX alleged a novation in its Third Amended Complaint and Wynn Oil was released thereby from its obligations to SX; that is to say, SX alleged that Wynn Oil had no liability to SX.

2. Even if SX did not intend to release Wynn Oil from its obligations, the third contract document dated November 18, 1975 (P. Ex. 4) effected this result as a matter of law; and

3. Wynn Oil cannot be liable for Wynn X's breach because Wynn Oil is not a party to the third contract document (P. Ex. 4).

Each of these three points is erroneous and insupportable. Wynn Oil is liable in this case because it took on certain obligations to SX by entering written agreements with SX. (P. Ex. 1, 3) The obligations originally undertaken by Wynn Oil to SX were to pay 75 percent of the cost of exploration, drilling and development of the Gallagher Prospect. Although Wynn Oil's obligations were modified by reducing the percentage of drilling and exploration

costs that Wynn Oil was required to pay from 75 percent to 50 percent, and although Wynn X was added as an additional obligor (P. Ex. 4), SX never intended to release and did not release Wynn Oil from its obligation. Thus, when the required payments were not made, Wynn Oil and Wynn X both became subject to judgment for 50 percent of the drilling and exploration costs. SX's pleading stated a claim for and prayed for relief against both Wynn C and Wynn X for breach of the written contract, and SX most certainly did not allege that Wynn Oil was released from its obligations by the addition of Wynn X as an obligor. Thus, there is no reason for this Court to grant Wynn Oil's Petition or to reverse the imposition of liability against Wynn Oil by both the trial court and a unanimous Court of Appeals. Indeed, a holding that Wynn Oil is not liable on its written obligations would be in direct conflict with the decisions of this Court that a party to a contract is liable for the breach of the contract. See, for example, *Bank of New Mexico v. Priestley, et al.*, State Bar of New Mexico Bulletin and Advance Opinions, Vol. 20, No. 13, March 26, 1981 at 355, discussed *infra*.

Wynn Oil's Motion for Rehearing should have been denied for lack of jurisdiction. However, in the event of reconsideration, this Memorandum addresses each of Wynn's three main arguments in separate sections below. Wynn's claim that the Court of Appeals' decision which affirmed the liability of Wynn Oil conflicts with certain prior decisions of this Court is also discussed in detail below.

II.

THE SUPREME COURT OF NEW MEXICO LACKED JURISDICTION TO GRANT THE MOTION FOR REHEARING BECAUSE THE MANDATE HAD BEEN ISSUED BY THE COURT OF APPEALS AND FILED IN THE DISTRICT COURT OF SANTA FE COUNTY.

This Court denied Wynn's Petition for Certiorari on February 18, 1981, and returned the record in this case to the Court of Appeals on the same date. On February 23, 1981, the Court of Appeals issued its Mandate to the District Court remanding this case to the District Court for proceedings consistent with the opinion of the Court of Appeals. The Mandate was issued "by direction of and in the name of the Chief Judge of the Court of Appeals." Where certiorari is sought to the Supreme Court of New Mexico, Rule 20 of the New Mexico Rules of Appellate Procedure provides in material part as follows:

> In addition, mandate from the Court of Appeals shall not issue until the time has elapsed for seeking certiorari to the supreme court. *If certiorari is so sought, mandate shall not issue until final disposition of the application for the writ* or, if the writ is granted, until final action on the cause by the supreme court. (Emphasis supplied).

The writ in this case was denied and the mandate under this rule could issue at any time after the Supreme Court's denial of the writ.

Wynn has filed no motion or taken any action to stay or recall the Mandate in this Court or in the Court of Appeals. The Mandate which was issued on February 23, 1981, by the Court of Appeals was received and filed by

the District Court on February 24, 1981. The trial court has taken no action on the Mandate as of this date.

After the Mandate is filed in the district court following denial of a writ for certiorari, the Supreme Court lacks jurisdiction to act further in the case. In *Hayes v. Reeves*, 91 N.M. 174, 571 P.2d 1177 (1977) this Court had before it a motion for reconsideration of an order denying certiorari. The court noted that New Mexico no longer had a rule permitting recall of the mandate at any indefinite future time and stated as follows:

> Defendants filed a motion for reconsideration of their petition for certiorari, which was treated as a motion for rehearing as provided for by Civil Appellate Rule 19 [§ 21-12-19, N.M.S.A. 1953 (Supp. 1975)]. We determined that certiorari had been improvidently denied and recalled the Court of Appeals' mandate before it was filed in the district court.
>
> Plaintiffs argue that this Court lost jurisdiction at the time the mandate was sent down by the Court of Appeals. We do not accept this view. New Mexico formerly had an appellate rule allowing recall of a mandate. Supreme Court Rule 17(6) [§ 21-2-1(17)(6), N.M.S.A. 1953 (Repl. 1970)]. Although this rule was not retained, the present rules provide for motions for rehearing if timely filed after a decision of this Court. A denial of a petition for certiorari is a decision within the meaning of the rule.
>
> Even if there was no rule covering the matter, this Court has the inherent power to recall a mandate where clear error appears and the interests of justice so demand. This power must be exercised sparingly. Whether occasioned by a motion for rehearing or initiated by the Court under its inherent power, rehearings will seldom be granted after a mandate has

issued. In Woodson v. Lee, 74 N.M. 227, 392 P.2d 419 (1964) this Court addressed a similar problem and quoted from the annotation at 84 A.L.R. 579 (1933) that "to require courts to consider and reconsider cases at the will of litigants would deprive the courts of that stability which is necessary in the administration of justice." The Court also stated the following:

> Although no time within which a mandate may be recalled is prescribed by our rules, it would seem fairly certain that upon mandate having been issued by us and action having been taken thereon in the district court, jurisdiction of this court would be at an end.

74 N.M. at 230, 392 P.2d at 420.

In the present case, no action had been taken on the mandate. *The mandate had not been filed in the trial court prior to its recall.* We hold that this Court retained jurisdiction to hear the defendants' motion for reconsideration. (Emphasis supplied).

As noted earlier, the *mandate was filed* in the District Court on February 24, 1981, prior to this Court's order granting Wynn Oil's Motion for Rehearing on March 10, 1981. This case thus raises the issue of whether the filing of the mandate precludes rehearing absent extraordinary and compelling circumstances. Certainly the tedious and convoluted arguments advanced by Wynn Oil in support of rehearing fall far short of the circumstances contemplated by *Hayes v. Reeves, supra.* This Court need not reach the issue in this case of what circumstances justify recall of a mandate which has already been filed in the trial court. Because the mandate in this case has been filed with the trial court, and no effort has been made by Wynn Oil to

recall it, this Court should withdraw its order granting Wynn Oil's Motion for Rehearing of the denial of certiorari.

Finally, under its own decisions, this Court lacked jurisdiction to enter the order of March 10, 1981 granting Wynn's Motion for Rehearing. This Court has squarely held that an appellate court loses jurisdiction over a cause once the mandate has been issued and filed in the trial court. *Woodson v. Lee,* 74 N.M. 227, 392 P.2d 419 (1964); *In re Protest of Miller,* 89 N.M. 547, 555 P.2d 142 (1976); *B & H Co., Inc. v. Moss,* 89 N.M. 549, 555 P.2d 372 (1976). This appears to be a general rule of appellate jurisdiction. See 5 Am.Jur.2d, Appeal and Error § 1007 (1962). Because this Court lacked jurisdiction to enter its order of March 10, 1981 granting Wynn's Motion for Rehearing of the denial of certiorari, this Court should withdraw the March 10, 1981 order and permit the denial of certiorari to stand.

III.

SX DID NOT ALLEGE A NOVATION.

The proposition that SX alleged in its Third Amended Complaint a novation and release of Wynn Oil is at once the most important proposition to Wynn Oil's position and the most preposterous. Indeed, Wynn Oil is only able to make such a suggestion by focusing on one sentence of one paragraph of a 12 page complaint with 26 pages of exhibits attached thereto and by placing a tortured interpretation on that one sentence.

The language upon which Wynn Oil bases its argument is the underlined portion of Paragraph 8 of the Third Amended Complaint set out in full below:

> 8. On or about November 24, 1975, the aforementioned written *Operating Agreement was amended in*

> *writing to provide that the interest of defendant R. C. Wynn through Wynn Oil pursuant to the Operating Agreement was 50 percent,* and all costs and liabilities incurred in the exploration and development would be paid according to such interest. *In addition, the written amendment further provided that defendant R. C. Wynn would substitute his alter ego Wynn Exploration in place of his alter ego Wynn Oil in the written Operating Agreement.* A true and correct copy of said written amendment is attached hereto, marked Exhibit "C" and incorporated herein by this reference as though set forth in full. (Emphasis supplied).

In claiming that SX has alleged a novation and release of Wynn Oil by this language, Wynn Oil ignores all of the following. SX's original complaint named Wynn Oil as a party defendant (R. 1), alleged that SX and defendant Wynn Oil entered into the September 8, 1975, letter agreement (P. Ex. 1) regarding the exploration of the Gallagher Prospect (R. 2) and that SX and Wynn Oil entered into the September 15, 1975 Operating Agreement (P. Ex. 13) also regarding the Gallagher Prospect. (R. 2-3) The original complaint further alleged that on November 24, 1975, there was a transfer of the Gallagher Prospect from Wynn Oil to Wynn X. (R. 3) However, SX made plain in its pleading that SX considered Wynn Oil to be liable on the contract when SX expressly alleged that both Wynn Oil and Wynn X had breached the written agreement (R. 3-4) and prayed for judgment against both Wynn Oil and Wynn X for breach of contract as well as relief under the other causes of action. (R. 6-7)

SX's pattern of pleading against Wynn Oil in the original complaint was maintained throughout three amendments to the complaint. (R. 60, 158, 1810) In each amended complaint, Wynn Oil was identified as a party defendant

and a party to the contract. Wynn Oil was further alleged to be in breach of the contract and judgment was prayed for against Wynn Oil as well as Wynn X on all causes of action. In particular, SX alleged in Paragraph 11 of the Third Amended Complaint:

> 11. *Defendants and each of them have breached said written Operating Agreement and written amendment* by failing and refusing to pay the amounts set forth above required to be paid by them although demand has been made therefor by plaintiff SUSCO [now SX]. (R. 1813) (Emphasis added)

Moreover, as required by Rule 9(k) of the New Mexico Rules of Civil Procedure, SX attached to the original complaint and to each amendment the written documents upon which SX's claim for breach for written contract was based. These written documents clearly reflected Wynn Oil as a contracting party. In addition, the exhibits identified that a transfer had been made from Wynn Oil to Wynn X. However, the pleadings indicate that SX did not treat the transfer as a release of Wynn Oil because SX consistently sought judgment against Wynn Oil for breach of the contract.

Wynn Oil also ignores the prayer of Third Amended Complaint regarding the First Cause of Action (Breach of Written Contract) which states:

> WHEREFORE, plaintiff SUSCO [now SX] *prays for judgment against the defendants, R. C. Wynn and alternatively Wynn Oil and Wynn Exploration, and each of them,* as follows:
>
> FIRST CAUSE OF ACTION
>
> 1. For the sum of $1,275,820.30 plus interest on the amounts due as provided in said written Operating

> Agreement, and such operating and late charges as plaintiff may hereafter become aware; . . . (R. 1818) (Emphasis added)

If, as Wynn Oil maintains, SX had expressly pleaded a novation and release of Wynn Oil, it logically follows that Wynn Oil would not have been a party to this lawsuit. The error of Wynn Oil's tortured interpretation is shown by the fact that SX named Wynn Oil as well as Wynn X as a party defendant, specifically alleged breach of the written Operating Agreement and amendment (P. Ex. 1, 3, 4) and prayed for damages for breach of contract against both Wynn Oil and Wynn X. Wynn Oil was clearly put on notice by the pleadings that SX sought judgment against it for breach of contract. Because SX identified the Wynn Oil - Wynn X transfer, it was also obvious from the pleading, as the trial court ultimately found and the Court of Appeals affirmed, that Wynn Oil had not been released from its obligations to SX when Wynn X was added as an obligor. (Finding of Fact No. 5, R. 3639)

Wynn Oil also suggests that SX admitted a novation in a post-trial brief.[4] However, the position taken by SX in its post-trial brief is totally consistent with the testimony of SX's witnesses and the court's subsequent finding that Wynn Oil was a party to and bound by the agreement. The brief points out that Mr. Haseltine, the Vice President and General Manager of SX, was not concerned with where the deal was placed and agreed to a transfer of the asset from Wynn Oil to Wynn X for R. C. Wynn's tax and divorce problems. (R. 3476-77) At no point did the brief state that Wynn Oil was released from its obligations. Further, SX in concluding its trial brief requested the following relief:

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[4] Wynn Oil's belated efforts to demonstrate that SX pleaded or admitted a novation apparently arise out of its own failure to plead novation as an affirmative defense. See discussion *infra*.

II. CONCLUSION

> For all of the reasons set out in this Brief and in their respective pleadings on file in this cause, Southern Union Exploration Company and Southern Union Company request that *judgment be granted in their favor against the Wynn defendants, jointly and severally, in accordance with the prayers of such respective pleadings.* (R. 3543-44) (Emphasis added)

Thus, neither in the Third Amended Complaint nor in the post-trial brief did SX allege or argue that the transfer of the asset from Wynn Oil to Wynn X constituted a novation by which Wynn Oil was released from its obligations to SX. Accordingly, the Court of Appeals' decision which rejected Wynn Oil's contention that SX pleaded a novation and release of Wynn Oil was correct.

Wynn's novation argument must fail for another reason. It is necessary for a defendant claiming novation to explicitly plead novation as affirmative defense. As the court said in *Lincoln v. King,* 193 S.W.2d 437, 439 (Tex.Civ.App. 1946):

> If a novation is relied on as a defense it is classed as an affirmative defense matter and the essential fact should be specifically pleaded by defendant so as to put the adversary on notice. It is not sufficient to plead a general denial.

Wynn did not plead novation as affirmative defense. Rather, Wynn pleaded and attempted to prove at trial that Wynn Oil was never a party to any of the contract documents because the signing of the contract in Wynn Oil's name was a "mistake." Nor did Wynn request that the trial court find that there was a novation. Instead, Wynn sought

findings that Wynn Oil was never a party to the contract and the appearance of Wynn Oil's name as signatory to the contract was a mistake. (Wynn's Requested Findings of Fact, Nos. 5, 7; R. 3609) However, the theory which Wynn pleaded and upon which Wynn proceeded during trial was discarded after the trial court disbelieved Wynn's "mistake" testimony. Wynn's attempt to reverse the judgment against Wynn Oil on the basis of novation arguments should theretofore be rejected for the further reason that Wynn Oil failed to plead novation as an affirmative defense and failed to request a finding that a novation occurred. Under such circumstances, the matter is presented for the first time on appeal and should not be considered. *See Romero v. Sanchez,* 86 N.M. 55, 56, 519 P.2d 291 (1974).

IV.

THE TRIAL COURT CORRECTLY FOUND THE NOVEMBER 18, 1975 AMENDMENT TO THE OPERATING AGREEMENT DID NOT EFFECT A NOVATION BECAUSE SX NEVER INTENDED TO RELEASE WYNN OIL AND THE TRIAL COURT'S FINDING IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

As just noted, Wynn Oil's novation argument is not appropriate for consideration on appeal because it was never raised in the trial court. In addition, it must be recognized that Wynn Oil's Petition, particularly on this portion of the novation argument, is no more than an attempt to have this Court engage in a reconsideration of all the evidence presented to the trial court. Wynn Oil made the same attempt in the Court of Appeals but it was rejected because it violates the substantial evidence rule. (Court of Appeals Opinion, p. 7)

Indeed, it is well settled in New Mexico that findings of a trial court will not be disturbed on appeal if they are supported by substantial evidence. *Marez v. Kerr McGee Nuclear Corp.*, 93 N.M. 9, 595 P.2d 1204 (Ct.App. 1978); *Gammon v. Ebasco Corp.*, 74 N.M. 789, 399 P.2d 279 (1965). Substantial evidence is relevant evidence which a reasonable mind accepts as adequate to support the conclusion. *Shirley v. Venaglia,* 86 N.M. 721, 527 P.2d 316 (1974); *Tapia v. Panhandle Steel Erectors Co.,* 78 N.M. 86, 428 P.2d 625 (1967). In deciding whether a finding has substantial support, the evidence must be viewed with all inferences reasonably deductible from such evidence in the light most favorable to support the finding. *Gallegos v. Duke City Lumber Co., Inc.,* 87 N.M. 404, 534 P.2d 1116 (Ct. App. 1975). In determining whether substantial evidence exists, only favorable evidence is to be considered. *United Veterans Organization v. New Mexico Property Appraisal Dept.,* 84 N.M. 114, 500 P.2d 199 (Ct.App. 1972).

Wynn Oil's second specious argument is that the November 24, 1975 amendment to the Operating Agreement, (P. Ex. 4) effected a novation as a matter of law. The language relied upon by Wynn Oil in making this argument is that the Wynn X "was desirous of the change of name of Company from Wynn Oil Company to Wynn Exploration Company" (P. Ex. 4).

This language on its face does not expressly release Wynn Oil from any liability undertaken in the first two contract documents. Moreover, the record supports the conclusion reached by the trial court that "the letter agreement [P. Ex. 4] was not intended by the parties to release Wynn Oil Company from its obligations to Southern Union Exploration Company regarding the Gallagher prospect" (Finding of Fact No. 5; R. 3639). For example, Oran Hasel-

tine, the Vice-President and General Manager of SX always looked for payment from Wynn Oil as well as Wynn X. (T. 255, 297-98, 3389)

Not only did SX continue to treat Wynn Oil as a party to the contract after November 24, 1975, (P. Ex. 13, 37, 46) but also Wynn Oil itself continued to participate in the project. For example, Wynn Oil transmitted to SX the consent to the drilling of one of the wells on the Gallagher prospect in May, 1977. (P. Ex. 117) Finally, it is clear that SX certainly placed a construction on the contract that Wynn Oil remained obligated. Indeed, demand was made by SX directly upon Wynn Oil for payment on May 21, 1976 prior to filing suit. (P. Ex. 66) As previously noted, SX first billed Wynn in February, 1976. That billing was due to be paid in March, 1976. When payment was not forthcoming, SX promptly sued Wynn Oil as well as Wynn X in June, 1976.

Texas law is applicable to decide the issue whether there was a novation releasing Wynn Oil because the contract documents were executed in Texas. The Texas law is stated by the Court of Appeals by referring to three cases, *Russell v. Northeast Bank,* 527 S.W.2d 783 (Tex.Civ.App. 1975), *Ridgleawood, Inc. v. White,* 380 S.W.2d 766 (Tex.Civ.App. 1964), and *Allstate Insurance Co. v. Clarke,* 471 S.W.2d 901 (Tex.Civ.App. 1971). Without reciting the language of the decisions quoted at page 5 of the New Mexico Court of Appeals' Opinion, it may be said generally that the holding of these cases is that the parties must intend that a novation take place and must agree that one debtor will take place of another and that the first debtor will thereby be released from its obligations.

Although Wynn Oil initially cited *Ridgleawood, supra* to the Court of Appeals as being a case in which the law regarding novation was correctly stated (Wynn Brief-in-Chief, p. 24), Wynn now maintains that *Ridgleawood* as

well as the other cases quoted by the New Mexico Court of Appeals are unreliable. Wynn now argues in this Court that the only correct authority is *Chastain v. Cooper & Reed,* 152 Tex. 322, 257 S.W.2d 422 (1953).[5]

Wynn represents to this Court that *Chastain* stands for the following proposition:

> Where a first and second party have made a prior bilateral contract, but, pursuant to a subsequent bilateral contract between the first party and a third party, the latter is substituted in the place of the second party and agrees to perform the same or a new obligation, the subsequent contract is a novation *as a matter of law which releases the second party and his obligation under the prior contract,* even though the second party did not sign the subsequent contract, and even though the first party did not expressly release the second party. *In other words, novation by substitution as a matter of Texas law is not dependent upon proof of intent to release; rather, the release is the consequence of legal affect of the substitution.* (Wynn's Petition for Certiorari, p. 17-18) (Emphasis in part in original.)

Direct and indisputable proof that Wynn has misread *Chastain* is found right in the *Chastain* opinion. The Texas

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[5] Despite Wynn's disclaimer of the *Ridgleawood* case before this Court, it should be noted that the Court in *Ridgleawood* cited directly to *Chastain* as authority for its statement of law. *Ridgleawood,* 380 S.W.2d at 768. Thus, there is even more support that the two cases are in accord on the law of novation, and that Wynn's reading of the two cases is in error.

Supreme Court states the law of novation in Texas as follows in *Chastain*:

> There is no serious disagreement between the parties as to the legal incidents of a novation. In the absence of such inconsistent provisions of two contracts that both cannot stand, thereby working an implied novation, *it is held that a second contract will operate as a novation of the first contract only when the parties to both contracts intend and agree that the obligations of the second shall be substituted for and operate as a discharge of the obligations of the first.* Money v. Dameron, Tex.Civ.App. 70 S.W.2d 291, writ refused; Cooper Grocery Co. v. Strange, Tex.Com.App. 18 S.W.2d 609; 31 Tex.Jur., pp. 394-397, Secs. 9 and 10. In keeping with this general rule, it is held that to effect a novation by the substitution of one debtor for another thereby releasing the first, there must be agreement to that effect between all three parties, *and a presumption of an intention to release the first debtor will not arise from the mere taking of the second.* Scott, Adm's v. Atchison, 36 Tex. 76; *Id.*, 38 Tex. 384, 385-390; *Pierce Fordyce Oil Ass'n v. Woods*, Tex.Civ.App., 180 S.W. 1181, 1183, writ refused; *Money v. Dameron*, Tex.Civ.App., 70 S.W.2d 291, 293. (Emphasis added)

Chastain v. Cooper & Reed, 257 S.W.2d at 424.

Wynn's self-serving and incorrect interpretation of *Chastain* is thus totally undercut by reference to what the Texas Supreme Court actually said. It also becomes immediately apparent that the statement of the law of novation in *Chastain* is precisely the same as that cited by the New Mexico Court of Appeals from *Russell, Ridgleawood* and *Allstate*.[6]

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[6] Additional authority that novation can only exist by mutual consent and agreement of all the interested parties is found in Texas cases cited by SX in its Answer Brief at pages 47-51.

The most that can be read into the *Chastain* opinion is that the actions of Chastain's obligee proved that the obligee intended to release Chastain from Chastain's obligations when the obligee accepted a second obligor. However, no similar proof exists with regard to SX in the present case. To the contrary, as outlined above, SX never intended to release Wynn Oil, and, in fact, sent a demand letter to Wynn Oil for payment and always looked to Wynn Oil in addition to Wynn X for payment. Hence, there is no legal or factual support for Wynn Oil's argument that Wynn Oil was released as a matter of law notwithstanding SX's proven intention to hold Wynn Oil liable. There is substantial evidence supporting the trial court's finding that SX did not intend to release Wynn Oil. Therefore, there is no reason to grant certiorari or to reverse the Court of Appeals affirmation that Wynn Oil is liable to SX.

V.

SX PLEADED AND PROVED THAT WYNN OIL, IN ADDITION TO WYNN X, WAS LIABLE ON THE BASIS OF A BREACH OF WRITTEN AGREEMENT.

Wynn Oil's third incorrect claim is that Wynn Oil was not put on notice by SX's pleadings that SX sought recovery against Wynn Oil for breach of a written contract. Wynn Oil further asserts that Wynn Oil could not be liable because it was not a party to the third contract document at the time that the contract was breached.

If anything is clear in this case, it is that SX alleged that both Wynn Oil and Wynn X were guilty of breach of contract and liable for payment of one-half of the cost of drilling and exploring the Gallagher Prospect. (See pp. 5-6, supra) Wynn's contention that SX's claim against Wynn

Oil for breach of contract was not pleaded in accordance with Rule 8 of the New Mexico Rules of Civil Procedure nor was relief for breach of the written agreement prayed for is indeed "frivolous" in the words of the Court of Appeals. (Court of Appeals Opinion, p. 2)

Wynn next incorrectly argues that Wynn Oil was held liable on different theories by the trial court and the Court of Appeals. In particular, Wynn claims that the trial court held Wynn Oil liable because Wynn Oil was involved in all three contract documents while the Court of Appeals stated that Wynn Oil was liable only on the basis of it signing the first two documents.

Both the trial court and the Court of Appeals correctly perceived that Wynn Oil became liable for certain expenses in the drilling of the Gallagher prospect by virtue of Wynn Oil's signing the initial letter agreement and the Operating Agreement. (P. Ex. 1, 3) The amendment to the Operating Agreement (P. Ex. 4) reduced the liability of Wynn Oil to 50 percent of the drilling costs and it added a second obligor, Wynn X. Because there was no release of Wynn Oil by virtue of the third document, when the money for the drilling expenses was not paid, both Wynn Oil and Wynn X were liable for the obligation. Even though Wynn Oil did not sign the third document, Wynn Oil remained liable for the unpaid drilling expenses. (Court of Appeals Opinion, pp. 6-7) Wynn Oil's position is much like that of an individual who signs a contract as an accommodating party. Even though the transaction may belong to someone else, the accommodating party remains responsible for the performance of the contract. See *Bank of New Mexico v. Priestley,* 20 N.M. State Bar Bulletin 900 (March 26, 1981). Wynn Oil's position is commonplace in the law and in business affairs, and there is simply no legitimate basis for Wynn Oil to contend that either the District Court or the

Court of Appeals was incorrect in holding Wynn Oil liable in this case.

VI.

THERE IS NO BASIS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS OPINION DOES NOT CONFLICT WITH EXISTING SUPREME COURT DECISIONS.

The Court of Appeals decision does not conflict with six prior Supreme Court cases specified by Wynn Oil in its Petition for Writ of Certiorari. These cases are discussed below.

(1) Wynn Oil first claims that there is a conflict between the Court of Appeals decision and *Matter of One Cessna Aircraft, etc.*, 90 N.M. 40, 559 P.2d 4171 (1977) which holds generally that judicial admissions are conclusive. It should be noted that Wynn is now arguing for the first time that SX's pleadings constituted a judicial admission of novation which could not be later contradicted. Wynn argued to the Court of Appeals that if admissions were neither contradicted nor explained, they were conclusive. (Wynn Brief-in-Chief, p. 15)

The Court of Appeals responded to Wynn's arguments by stating that the effect of an admission depends upon the application of the uncontradicted evidence rule and noted that the claimed admissions were contradicted. (Court of Appeals Opinion, p. 4) More important, the Court of Appeals never accepted Wynn's proposition that SX had "admitted" in its pleadings that there was a novation which released Wynn Oil. (Court of Appeals Opinion, p. 4)

In any event, whether one agrees that the Court of Appeals response to Wynn Oil's "old" admission argument

totally address Wynn Oil's "new" admission argument, the basic conclusion of the Court of Appeals that there was not an admission in SX's pleadings of a novation which released Wynn Oil was correct and remains valid whichever admission rule is applied.

Further, the Court of Appeals noted that "the assumed admissions were contradicted by the express wording of the third document . . . ." (Court of Appeals' Opinion, p. 4) Thus, the Court of Appeals recognized that the third document which became part of SX's pleading by its incorporation into the Third Amended Complaint, also contradicted Wynn's interpretation of the pleadings and provided yet another basis for rejecting Wynn's argument that the pleadings contained an admission of a novation.

Again, Wynn Oil has provided no reason for this court to reverse the decision of the Court of Appeals with regard to Wynn Oil because Wynn Oil has not, and cannot, establish that there was an admission by SX, judicial or otherwise, that there was a novation by which Wynn Oil was released from its obligations to SX. The present case does not conflict with *Matter of One Cessna Aircraft* because it holds that there was no admission by SX, judicial or otherwise, that there was a novation by which Wynn Oil was released.

(2) The second claimed conflict is between the Court of Appeals' Opinion in this case and *Jernigan v. New Amsterdam Casualty Co.*, 679 N.M. 336, 367 P.2d 519 (1961) which holds that the construction placed on a contract by the parties is controlling. Wynn claimed that the allegation of novation by SX constituted a construction of the November 18, 1975 document (P. Ex. 4). (Wynn Petition for Writ of Certiorari, pp. 2, 13) The Court of Appeals' decision does not conflict with *Jernigan* because the Court of Appeals rejected Wynn's contention that SX, in its

pleadings, construed the third document as a novation releasing Wynn Oil. Accordingly, the conflict is not between the Court of Appeals and the *Jernigan* decision. Rather the conflict is between the Court of Appeals and Wynn's convoluted interpretation of SX's pleadings which the Court of Appeals rejected.

(3) Wynn claims that the Court of Appeals opinion is in conflict with *Chastain v. Cooper & Reed, supra.* However, the quotation from *Chastain* at page 13 hereof demonstrates that Wynn Oil's contention is without merit. The Texas Supreme Court stated in its opinion in *Chastain* that the parties to both contracts had to intend and agree that the obligation of a second obligor shall be substituted for and operate as discharge of the obligations of the first obligor for novation to be effected. The New Mexico Court of Appeals correctly stated and applied that law. There was evidence to support the trial court's finding that SX never intended to release Wynn Oil. Therefore, there is no justification for reversing the Court of Appeals' opinion on the basis of a claimed conflict with *Chastain v. Cooper & Reed.*

(4) It is also clear that the Court of Appeals' Opinion in this case does not conflict with *Cessna Finance Corp. v. Mesilla Valley Flying Service,* 81 N.M. 10, 462 P.2d 144 (1969), because SX's claim that Wynn Oil was liable on the basis of a breach of written contract attached to the pleadings was a sufficient allegation of liability. Nor is there a conflict with *Leonard Farms v. Carlsbad Riverside Terrace,* 90 N.M. 34, 559 P.2d 411 (1977), because SX clearly pleaded and tried its claim against Wynn Oil for breach of contract and expressly prayed for damages for Wynn Oil's breach of written contract.

(5) As an adjunct to its argument that the Court of Appeals found Wynn Oil liable on that basis of its signing

the first two contract documents while the trial court said Wynn Oil was liable on the basis of all three contract documents, Wynn claims that the Court of Appeals must necessarily have found facts to reach this conclusion. It is claimed that this contradicts the case of *Guidry v. Petty Concrete Co.*, 77 N.M. 531, 424 P.2d 806 (1967), which held that an appellate court will not determine matters of fact not determined below. However, the Court of Appeals did not redetermine facts. It only pointed out to Wynn Oil that Wynn Oil could not prevail on the theory that Wynn Oil did not sign all three documents. The Court of Appeals said:

> This [that Wynn Oil did not sign the November 18, 1975 amendment to the Operating Agreement] has no effect on the liability of Wynn Oil for its obligations under the first two documents. (Court of Appeals Opinion, p. 6.)

The Court of Appeals' handling of Wynn Oil's argument that Wynn Oil did not sign the third document is no cause for reversal because the basic decision is correct that Wynn Oil is liable to SX based on obligations it undertook to SX and which were never released by SX.

(6) In Wynn's Supplemental Citation of Authority filed February 14, 1981, Wynn claims that the present decision is also contrary to *Barnes v. Sadler Association, Inc.*, State Bar of New Mexico Bulletin and Advance Opinions, Vol. 20, No. 7, February 12, 1981, at 183. The holding of *Barnes* is that an officer of a corporation who signs a contract for the corporation is not personally liable for the corporation's breach of contract. *Barnes* has no application to this case. In this case, it was found that a corporation, Wynn Oil did sign a contract with SX and was never released therefrom by a later amendment. There is no conflict between *Barnes*

and the present case because the facts of *Barnes* are so different from the facts of the present case. Thus, there is no basis for granting certiorari in view of the *Barnes* case.

(7) Finally, a reversal of Wynn Oil's liability in this case would directly conflict with this Court's opinion in the recent case of *Bank of New Mexico v. Priestley, et al.*, State Bar of New Mexico Bulletin and Advance Opinions, Vol. 20, No. 13, March 26, 1981 at 355. In *Priestley* the Supreme Court of New Mexico reversed a holding by the Court of Appeals (19 N.M. State Bar Bulletin 900, Sept. 25, 1980) that two individuals who signed a contract in their individual capacities were not liable for breach of contract because the Court of Appeals believed that that individuals were merely intended to be guarantors of contract performance by a corporation. The Supreme Court correctly held the individuals liable because they signed the contract. The Court said:

> In Mortgage Investment Co. v. Toone, 17 Utah 2d 152, 153, 406 P.2d 30, 31 (1965), the court stated that where a person personally signs an agreement without indicating he is an agent acting for a principal, "[h]e is . . . personally bound by the contract which he signed in his individual capacity. (Citation omitted.)" Cf. Barnes v. Sadler Assoc., Inc., No. 13, 154, , N.M. , P.2d (filed January 14, 1981). This rule is applicable in the instant case.

State Bar of New Mexico Bulletin and Advance Opinions at 358.

In this case, Wynn Oil has properly been held liable by the trial court and by the Court of Appeals upon written instruments which it signed on September 8 and 15, 1975 wherein it agreed to pay certain exploration, drilling and

development expenses. A holding by this Court which would relieve Wynn Oil from its express written obligation would conflict with this Court's holding in *Priestley*.

CONCLUSION

The Supreme Court should withdraw its Order granting Rehearing of Wynn Oil's Petition for Writ of Certiorari because the Court lacked jurisdiction after the Mandate was filed in the district court. If the Court proceeds with rehearing, the Supreme Court should again deny Wynn Oil's Petition for Writ of Certiorari. Upon careful examination, it becomes readily apparent that the Court of Appeals Opinion which affirms the liability of Wynn Oil is correct, and the principles and reasoning of the Court of Appeals do not conflict with prior holdings of this Court. Wynn Oil, the only solvent judgment debtor, should not be allowed to evade a substantial legitimate debt and judgment.

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CERTIFICATE OF MAILING

It is hereby certified that I caused to be mailed a true and correct copy of the foregoing Memorandum to Bigbee, Stephenson, Carpenter, Crout & Olmsted, P. O. Box 669, Santa Fe, New Mexico 87501; Grambling, Mounce, Sims, Galatzan & Harris, P. O. Drawer 1977, El Paso, Texas 79901; and Modrall, Sperling, Roehl, Harris & Sisk, P. O. Box 2158, Albuquerque, New Mexico 87103, on this 14th day of April, 1981.

VICTOR R. ORTEGA

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 13,505

WYNN OIL COMPANY,

Petitioner,

vs.

SOUTHERN UNION EXPLORATION COMPANY,

Respondent.

MEMORANDUM IN OPPOSITION TO WYNN OIL'S SECOND MOTION FOR REHEARING

On February 2, 1981, Wynn Oil Company ("Wynn Oil") filed its Petition for Writ of Certiorari in the New Mexico Supreme Court in an attempt to reverse a judgment entered against it in favor of Southern Union Exploration Company ("SX") for approximately $1.8 million on May 11, 1979 and affirmed by the New Mexico Court of Appeals on January 13, 1981 with some minor modifications. The bases for Wynn Oil's Petition for Certiorari were that:

1. SX alleged a novation in its Third Amended Complaint by which Wynn Oil was released from its obligation to SX.

2. Even if SX did not intend to release Wynn Oil from its obligations, one of the contract documents (P. Ex. 4) effected this result as a matter of law.

3. Wynn Oil could not be liable to SX because Wynn Oil was not a party to the last of the contract documents. (P. Ex. 4)

SX's position refuting each of these three points is contained in SX's Memorandum in Opposition to Wynn Oil's Petition for Writ of Certiorari on Rehearing filed April 14, 1981.

On February 18, 1981, the New Mexico Supreme Court denied Wynn Oil's Petition for Certiorari. On February 23, 1981, the New Mexico Court of Appeals issued its Mandate which was filed in the Santa Fe District Court on February 24, 1981.

On February 23, 1981, Wynn Oil filed a Motion for Rehearing of the Supreme Court Order denying Wynn Oil's Petition for Certiorari. On March 10, 1981, the Supreme Court granted the Motion for Rehearing, but on July 22, 1981, the Supreme Court entered an order vacating its March 10, 1981 Order and also denying Wynn Oil's Motion for Rehearing.

Having failed to obtain relief by way of certiorari or on motion for rehearing on substantive grounds, Wynn Oil has now filed a Second Motion for Rehearing. In general, Wynn Oil now attempts for the first time in this litigation to raise constitutional issues regarding due process and full faith and credit. Wynn Oil's latest motion has no merit, as will be demonstrated below, and is an obvious effort to delay SX's collection of debts which started to accumulate in March, 1976. Delay for any reason works to Wynn Oil's advantage because the judgment which SX obtained on May 11, 1979 bears interest at 10% per annum while the prime rate at the present time is closer to 20% per annum.

In opposition to the specific points raised in Wynn Oil's in Second Motion for Rehearing, SX states:

1. The Supreme Court lacks jurisdiction to grant the Second Motion for Rehearing because the mandate has been issued by the Court of Appeals and filed in the district court of Santa Fe. *Hayes v. Reeves,* 91 N.M. 174, 571 P.2d 1177 (1977). The *Hayes* case is discussed at pages 5-8 of SX's Memorandum in Opposition to Wynn Oil's Peti-

tion for Writ of Certiorari on Rehearing, and the *Hayes* doctrine regarding lack of jurisdiction applies to Wynn Oil's Second Motion for Rehearing as well as the first Motion for Rehearing. It is again noted that the mandate of the Court of Appeals, having been filed in the district court, has not been recalled.

2. Contrary to Wynn Oil's Second Motion for Rehearing, Wynn Oil had notice and an opportunity to be heard on the factual and legal bases of liability found by the trial court and the Court of Appeals. Wynn Oil is liable in this case because it took on certain obligations to SX by entering written agreements with SX from which it was never released. The pleadings of SX with regard to Wynn Oil, which are summarized in some detail on pages 9-11 of SX's Memorandum in Opposition to Wynn Oil's Petition for Writ of Certiorari on Rehearing, generally identify Wynn Oil as a party defendant, allege that Wynn Oil entered into certain agreements with SX, identify the transfer of the Gallagher Prospect from Wynn Oil to Wynn X, state that Wynn Oil remains liable on the contract after the addition of Wynn X and pray for judgment against both Wynn Oil and Wynn X. SX's pattern of pleading was maintained throughout all amended complaints and it is indisputable that, if nothing else, Wynn Oil knew that SX was seeking judgment against it for breach of the contract to pay one-half of the drilling expenses for the Gallagher Prospect.

In making the argument that it lacked notice, Wynn Oil attempts to ignore a basic fact which cannot be ignored. Wynn Oil's trial strategy in the face of SX's complaint was to maintain that Wynn Oil had never signed any contracts with SX regarding the Gallagher Prospect. This position was developed and documented by Wynn Oil throughout the discovery phase of this case which encompassed over two years from June 29, 1976 until the start

of trial on November 13, 1978 and consisted of almost 4,000 pages of pleadings excluding numerous depositions. Similarly, Wynn Oil maintained at the trial, which lasted for some 19 days and produced approximately 3,500 pages of testimony, that Wynn Oil was not liable for breach of contract because it had never signed a contract with SX on the Gallagher Prospect. Wynn Oil lost on this argument in the trial court mainly because the signature of Wynn Oil on the contract documents was there in black and white for all to see.

Having lost on its argument in the trial court that Wynn Oil never signed any of the contract documents, Wynn Oil took a contrary position on appeal. That position was that Wynn Oil did sign two of the contracts (P. Ex. 1, 3) but that Wynn Oil was released from its obligations by the third of the contract agreements (P. Ex. 4).

It is apparent from even this brief discussion that Wynn Oil was not deprived of the opportunity to argue in the trial court that it was released from its acknowledged contract obligations by the third of the contract documents. Rather, Wynn Oil decided to take the untenable position at trial that it was not a party to any contract document. It is thus illogical and insupportable for Wynn Oil to now argue that it did not have notice and the opportunity to argue the position it pressed in the appeals court. Wynn Oil simply followed a different trial strategy in the trial court and was clearly not deprived of any constitutional rights.

3. Wynn Oil also argues that a finding that it was liable to SX on the contracts constituted arbitrary and capricious action in violation of established principals of law and judicially admitted facts. The law which forms the basis for the legal liability of Wynn Oil is set out in both the Answer Brief of SX in the Court of Appeals and in the

Memorandum in Opposition to Wynn Oil's Petition for Writ of Certiorari on Rehearing. The Supreme Court has already reviewed these briefs, as well as the briefs submitted by Wynn Oil, and has rejected Wynn Oil's arguments. Having found legal bases for the liability of Wynn Oil in prior proceedings, there is no reason for this Court to grant Wynn Oil's Second Motion for Rehearing on the basis that there are no legal grounds for liability. No new facts or cases have been brought to the Court's attention in the second Motion for Rehearing. Accordingly, another review is neither deserved nor justified.

4. Wynn Oil next incorrectly argues that in deciding that Wynn Oil was not released from its obligations to SX, the courts have failed to give full faith and credit to the Texas case of *Chastain v. Cooper & Reed,* 152 Tex. 322, 257 S.W.2d 422 (1953). This argument is not new to this case. The difficulty with it is that *Chastain* is not authority for Wynn's position. A full discussion of *Chastain* is contained at pages 14-17 of SX's Memorandum in Opposition to Wynn Oil's Petition for Writ of Certiorari on Rehearing.

Chastain clearly states that a party in Wynn Oil's position is liable to a party in SX's position unless SX intended to release Wynn Oil when SX took on the additional debtor, Wynn X. The trial court specifically and expressly found that SX had no such intention (Finding of Fact No. 5, R. 3567) and therefore Wynn Oil is definitely liable under *Chastain.* Wynn advances a convoluted and incorrect interpretation of *Chastain* which the Supreme Court has properly rejected. Rejection of an incorrect reading of a case from another jurisdiction is hardly failure to give full faith and credit to that decision.

5. Finally Wynn Oil claims that if the Court of Appeals' decision is allowed to stand it will inject uncertainty into dealings similar to the one out of which this lawsuit arose. The opposite is true.

On the specific issue which forms the core of Wynn Oil's argument, novation, the New Mexico Supreme Court has recently authored an opinion which is consistent with the decision of the Court of Appeals in this case. In *Simms v. Craig,* State Bar of New Mexico Bulletin and Advance Opinions, Volume 20, No. 21, May 21, 1981 the New Mexico Supreme Court states, as *Chastain* did, that one element of novation is "an agreement to the new contract by all the parties" and that "in order to effect a novation there must be a clear and definite intention on the part of all concerned that such is the purpose of the agreement . . ."

Generally speaking, the decision of the trial court and the Court of Appeals is that a party which agrees in writing to pay 50% of the cost of certain oil and gas exploration costs and is not released from that obligation must pay 50% of the oil and gas exploration costs. The decision reaffirms a basic and necessary tenet of the law that a party cannot avoid its contractual obligations just because a venture does not live up to hoped for results.

CONCLUSION

In summary, Wynn Oil is apparently trying in its Second Motion for Rehearing to inject, at the latest possible moment, potential constitutional issues into this proceeding. Issues not raised in the trial court or in the Court of Appeals or by petition for writ of certiorari to this Court should not be heard now. Wynn's purpose appears to be to delay the collection of SX's judgment and to raise an issue in this Court which might form the basis for a petition for certiorari to the United States Supreme Court. SX respectfully requests that the Second Motion for Rehearing be denied at the earliest possible time so that SX may collect its judgment without further delay and avoid further dam-

age to its position occasioned by the limits of the interest that it may obtain on its judgment against Wynn Oil.

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CERTIFICATE OF MAILING

It is hereby certified that I caused to be mailed a true and correct copy of the foregoing Memorandum in Opposition to Wynn Oil's Second Motion for Rehearing to Bigbee, Stephenson, Carpenter, Crout & Olmstead, P.O. Box 669, Santa Fe, New Mexico 87501; Grambling, Mounce, Sims, Galatzan & Harris, P.O. Drawer 1977, El Paso, Texas 79901; and Modrall, Sperling, Roehl, Harris & Sisk, P.O. Box 2158, Albuquerque, New Mexico 87103 on this 16th day of August, 1981.

_____
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Petitioner's Reply Brief

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

No. 81-971

WYNN OIL COMPANY,

Petitioner

v.

SOUTHERN UNION EXPLORATION COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO AND THE COURT OF APPEALS OF NEW MEXICO

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case is not the simple collection matter Respondent pretends. It is a case where Petitioner has suffered a ruinously large adverse judgment after it has defeated Respondent on every point that could support that judgment. Petitioner won every legitimate point, but the New Mexico courts imposed an unconstitutionally irrational judgment against it.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

A. Background and Trial Proceedings

Southern Union repeatedly claims throughout its brief that the Third Document (App. I 7-8)[1] had the effect of

[1] References to the Appendix to the Petition for Writ of Certiorari are cited as "App." References to the Petition for Writ of Certiorari are cited as "Pet." References to the Plaintiff's trial exhibits are cited as "P. Ex."

adding Wynn Exploration as an "additional" obligor, rather than that of *substituting* Wynn Exploration for Wynn Oil as the contracting party. The very language of this document, and the construction given to it by the parties themselves (Pet. 6), refute this outrageous contention. Southern Union cites as its sole evidentiary support page 841 of the transcript, wherein R. C. Wynn testified that the name of the contracting party was changed to Wynn Exploration "because it was wrong and it was wrong in the inception, and there's no way that I could have put this property in Wynn Oil Company according to my account(ant)s and use good judgment. That's why we set up Wynn Exploration Company, it was for that, for things like that." Clearly, this testimony tends to disprove, not support, Southern Union's contention. Absolutely no evidence supports the position that the Third Document added Wynn Exploration Company as an additional obligor, rather than effectuating, in the words used by Southern Union in its Third Amended (trial) Complaint and its post-trial brief, a substitution of Wynn Exploration in place of Wynn Oil as *the* contracting party.

Try though it might, Southern Union simply cannot now erase its own words used in its trial complaint and in its post-trial brief. Southern Union specifically alleged in its trial complaint that the effect of the Third Document was to "*substitute* . . . Wynn Exploration *in place of* . . . Wynn Oil in the written Operating Agreement" (App. I 4 ¶ 8, emphasis added). In its post-trial brief, Southern Union reiterated that the Third Document was executed to comply with the request that "Wynn Exploration Company, Inc. ("Wynn Exploration") be *substituted* for Wynn Oil as *the contracting party* on the Wynn side" (10 R. 3466, emphasis added).

Southern Union in its brief has assiduously avoided any use of the word "substitute," but has liberally used the word "add." A given event, however, cannot be both a

substitution and an addition; it must be one or the other. Southern Union pled and tried this case on the theory that the Third Document effectuated a *substitution* of contracting parties; its about-face before this Court is explicable only as an apologist's attempt to rationalize the unconstitutionally irrational results below.

Southern Union claims that its pleading that "Defendants and each of them" had breached "the contract" sufficiently put Wynn Oil on notice of the theory of liability utilized by the Court of Appeals. The claim that "Defendants and each of them" had breached "the contract," however, coincided with Southern Union's claim that Wynn Oil was liable on an alter ego theory. Furthermore, Southern Union's averment that the effect of the Third Document was to "substitute . . . Wynn Exploration Company in place of . . . Wynn Oil" should have removed any possibility that Southern Union could recover from Wynn Oil for breach of the three-document contract on anything other than an alter ego theory.

Southern Union effectively pled itself out of court as against Wynn Oil on any theory other than the alter ego theory, and that it "considered Wynn Oil to be liable on the contract" certainly does not mean that it pled or proved any other theory on which Wynn Oil could possibly be held liable. That Southern Union "considered Wynn Oil to be liable on the contract" simply means that Southern Union somehow erroneously felt that Wynn Oil could be liable even though — to use Southern Union's words — Wynn Exploration had been substituted in place of Wynn Oil as the contracting party.

That Southern Union claims that it pled that Wynn Oil was liable for breach of "the contract" does have certain significance, however. Southern Union pled and tried, and the trial court found (App. G 2-3, Finding 4), one and only one contract, which consisted of the First, Second *and* Third Documents. Southern Union's contention that Wynn

Oil was liable for breach of "the contract" at most apprised Wynn Oil that Southern Union considered it to be liable on *the contract* — the three-document contract. It did not apprise Wynn Oil that the New Mexico Court of Appeals — after sustaining Wynn Oil's position that it was not a party to the Third Document, and hence not a party to the one contract pled, tried, and found — would hold Wynn Oil liable on the basis of the First and Second Documents alone. Though no doubt pleased by the result, Southern Union must have been equally mystified by the purported basis for the Court of Appeals decision.

Southern Union also erroneously claims that the evidence shows that it billed Wynn Oil and that Wynn Oil "replied to" other contract documents. It cites two exhibits and a transcript reference for this contention. Exhibit 66 consist simply of a demand letter addressed to R. C. Wynn at Wynn Oil, written the month before Southern Union filed suit. Exhibit 117, the other exhibit relied upon by Southern Union, consists of a well cost estimate approved by *Wynn Exploration Company* together with an attached letter of transmittal on Wynn Oil Company stationery. The sole transcript reference relied upon by Southern Union consists of nothing but testimony by a Southern Union witness to the effect that Southern Union had not been reimbursed for its drilling expenses. The actual invoices — Plaintiff's exhibits 136 through 143 — were addressed to Wynn Exploration Company, not Wynn Oil Company. Furthermore, the printed form operating agreement (the "Second Document") provided that if the non-operator did not specifically consent to the drilling of any well by the operator after the drilling of the initial well, then the non-operator would not be liable for any of the drilling costs. The evidence conclusively shows that Wynn Exploration, and not Wynn Oil, executed the consents on these wells (P. Exs. 39, 40, 46, 47, 52, 53, 67, 68, 99, 100, 105, 106, 115, 116, 117, 120, 121).

Regarding Wynn Oil's mistake contention, Wynn Oil's name did appear on the First and Second Documents. That Wynn Oil alleged that its name appeared on these documents by mistake, and that Wynn Exploration's name should have appeared on these documents, certainly does not relieve Southern Union of the consequences of its own pleading that the Third Document had substituted Wynn Exploration in place of Wynn Oil as the contracting party, and of its failure to plead for recovery against Wynn Oil on the basis of the First and Second Documents alone.

Southern Union in its brief has the audacity to claim that the trial court "excused" Wynn Oil's "default" in not tendering requested findings of fact and conclusions of law prior to the time that the trial court adopted the findings and conclusions proposed by Southern Union, and that the trial court entered its ultimate findings and conclusions on May 11, 1979, only after "*re*considering" (emphasis added) Wynn Oil's requested findings and conclusions. Southern Union of course neglects to mention that the trial court never responded to Wynn Oil's request for clarification, or even gave Wynn Oil notice that it intended to enter findings and conclusions without first having responded to its request for clarification, and that the trial judge entered his ultimate findings and conclusions the day after Wynn Oil filed its forty-eight (plus sub-parts) requested findings and thirty-two requested conclusions — allegedly after "*re*considering" them (Pet. 9-10).

In reply to Southern Union's totally baseless accusation that Wynn Oil has filed its Petition in this Court as "part of a strategy to delay," Petitioner would merely state that Southern Union would evidently deny it its last opportunity for review of an unconstitutionally irrational judgment procured by previous meritless Southern Union arguments.

B. Appellate Proceedings

With respect to Southern Union's claim that Wynn Oil's "statement of its other arguments on appeal is not accu-

rate" and that Wynn Oil has erroneously argued in its Petition that the Court of Appeals changed the findings of the trial court, the pertinent documents are contained in the Appendix to the Petition, and an inspection of them shows that this Southern Union claim is also groundless. Indeed, Southern Union's description of the trial court's basis for Wynn Oil's liability — that Wynn Oil was liable on the basis of the "initial contract documents" (i.e., The First and Second Documents) — is inaccurate. The trial court found only one contract, which consisted of the First, Second, *and* Third Documents, and held Wynn Oil liable for its breach on the purported basis that it was a party to all three documents (App. G 2-3, Findings 4 and 5). As even the Court of Appeals recognized, Wynn Oil clearly was not a party to this three-document contract.

How Southern Union can in good faith claim that Wynn Oil has "erroneously" argued that the Court of Appeals changed the findings of the trial court is simply beyond understanding. The first sentence of finding of fact No. 5 (App. G-3) provided as follows: "Wynn Oil Company was a party to all agreements with Southern Union Exploration Company regarding the Gallagher Prospect." The Court of Appeals ruled as follows with respect to the Third Document: "As Wynn Oil correctly asserts: 'No one executed this document on behalf of Wynn Oil. Manifestly, Wynn Oil was not a party to this agreement . . .' " (App. A-8). Having reversed this crucial fact finding on which the trial court predicated Wynn Oil's liability, the Court of Appeals should have reversed the judgment against Wynn Oil. Instead, it substituted in its place its own implicit, unsupported fact findings and own derelict "theory" of liability, none of which had previously seen the light of day.

REPLY TO RESPONDENT'S JURISDICTIONAL ARGUMENTS

A. This Case Presents Substantial Federal Questions.

Although Southern Union's claim against Wynn Oil should have been "a simple contract case," it was evidently too much for the New Mexico courts to handle on a rational basis.

Black v. Cutter Laboratories, 351 U.S. 292 (1955), cited by Respondent Southern Union, did involve a state's construction of a local contract under local law. The California court, however, did not reach an arbitrary and capricious result; this Court noted that the California court had placed a "reasonable construction" on the contract in question. 351 U.S. at 298-99. By contrast, the unanticipated imposition by the New Mexico Court of Appeals of this judgment on a substantively irrational basis, on a theory that had never previously been pled, tried or briefed, and *was totally unsupported by any fact finding,* in clear violation of New Mexico's own rules of appellate practice, gives rise to substantial federal questions in this case.

B. Petitioner Timely Raised The Federal Questions Below.

The cases cited by Southern Union at pages 11-13 of its Brief all involved situations where the petitioner attempted to raise federal questions for the first time in a petition for rehearing filed in the state court of last resort, after the highest state court that heard the case on the merits and wrote an opinion had sustained the judgment against the petitioner on the same basis as the next lower state court. These cases do not deal with a situation where the unanticipated, irrational decision of the state appellate court itself gives rise to the federal questions. In this case the federal questions arose by virtue of the unanticipated disposition of the case by the New Mexico Court of Appeals — the highest state court to hear the case on the merits and write an opinion — which reversed the crucial fact finding on

which the trial court judgment against Wynn Oil rested, but then went on to hold Wynn Oil liable on a totally irrational, previously unarticulated basis. Much more in point are the cases of *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 218 U.S. 673, 677-78 (1930), and *Saunders v. Shaw,* 244 U.S. 317, 319 (1917), discussed at pages 13-14 of the Petition, — and which Respondent Southern Union chooses to ignore — which hold that a federal question is timely raised after the last state appellate court opinion where the federal claim arises from the unanticipated disposition of the case by the state appellate court.

C. Petitioner Timely Filed Its Petition.

Once again, in its arguments that Petitioner did not timely file its Petition in this case, Respondent Southern Union completely misreads the applicable law and makes totally unsupportable argument. First, notwithstanding the clear wording of Supreme Court Rule 20.4, Southern Union argues that *Department of Banking v. Pink,* 317 U.S. 264 (1942), requires that the petition for rehearing "stay the effect" of the state court decision, and that under New Mexico Rule of Appellate Procedure 19(c), a motion for rehearing in the New Mexico appellate courts has no such effect. The post-judgment motion filed in the *Pink* case was not a petition for rehearing; as this Court wrote, "(u)nlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case." *Id.* at 266. Although the *Pink* case may be useful to distinguish a true petition for rehearing from other post-judgment motions, the distinction is based purely on the relief asked by the motion, and has nothing to do with whether or not the motion will "stay the effect" of the court's decision. Furthermore, although Southern Union has quoted from Rule 19(c), New Mexico Rules of Appellate Procedure, it has neglected to mention Rule 20, which specifically provides that where a motion for rehearing is filed, mandate shall not issue until "ten

days after disposition of such motion for rehearing," and that no mandate shall issue from the New Mexico Court of Appeals "until final disposition" of any application for writ of certiorari filed in the New Mexico Supreme Court.

Equally frivolous is Southern Union's claim that the ninety day period for filing a petition for writ of certiorari in this Court begins to run at the denial of the first, and not the second, petition for rehearing in the state appellate court. The cases cited by Southern Union do stand for the proposition that where the petitioner must obtain leave of court prior to filing a second petition for rehearing, and the leave is not granted, then the ninety day period begins to run at the time the first petition for rehearing is denied. *Gypsy Oil Co. v. Escoe*, 275 U.S. 498, 499 (1927), cited by Southern Union, however, specifically provides that where the second "petition is actually entertained by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denys such second petition." Clearly, Petitioner has timely filed its Petition in this Court.

REPLY TO RESPONDENT'S ARGUMENTS CONCERNING GRANTING THE WRIT IN THIS CASE

The "Argument" section of Respondent's Brief consist largely of continued mischaracterization of the facts, the procedural history of the case, and the contentions made by Wynn Oil, most of which have been addressed hereinabove. The arbitrary and capricious results reached by the New Mexico courts in this case do raise substantial federal questions. The constitutional principle that Wynn Oil seeks to vindicate here — that the Fourteenth Amendment requires state courts to accord to the litigants before them fair and rational treatment, which includes notice of the claim made, opportunity to rebut it, even-handed adherence to settled principles of appellate review, and substantive decision making which is neither arbitrary nor capricious — has

application to all litigants engaged in complex litigation in the state courts. The decision of the New Mexico Court of Appeals is totally incorrect and mocks the very concept of "justice between the parties," in that, notwithstanding its reversal of the crucial fact finding on which the trial court's judgment rested, it proceeded to sustain an innocent party's liability, on a substantively irrational theory, that had not been pled, tried or briefed, and, was totally unsupported by fact findings, in violation of its own rules of appellate review.

CONCLUSION

Wynn Oil Company has not received from the New Mexico courts the fair, rational treatment the Fourteenth Amendment requires them to provide. This Court should grant Wynn Oil's Petition for Writ of Certiorari, and reverse the judgments of the lower courts.

Respectfully submitted,

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